DOCKET

SUPREME COURT

No. 08-1191
Title: Robert Morrison, et al., Petitioners
v.
National Australia Bank Ltd., et al.
Docketed: March 25, 2009
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (07-0583)
Decision Date: October 23, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 9 2009	Application (08A609) to extend the time to file a petition for a writ of certiorari from January 21, 2009 to March 22, 2009, submitted to Justice Ginsburg.
Jan 13 2009	Application (08A609) granted by Justice Ginsburg extending the time to file until March 23, 2009.
Mar 23 2009	Petition for a writ of certiorari filed. (Response due April 24, 2009)
Apr 15 2009	Order extending time to file response to petition to and including May 26, 2009.
Apr 24 2009	Brief amicus curiae of National Association of Shareholder and Consumer Attorneys filed.
May 1 2009	Brief of respondents National Australia Bank Ltd., et al. in opposition filed.
May 11 2009	Reply of petitioners Robert Morrison, et al. filed. (Distributed)
May 12 2009	DISTRIBUTED for Conference of May 28, 2009.
Jun 1 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Aug 27 2009	Supplemental brief of petitioners Robert Morrison, et al. filed.
Oct 27 2009	Brief amicus curiae of United States filed.
Nov 9 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 9 2009	Second supplemental brief of petitioners Robert Morrison, et al. filed.
Nov 30 2009	Petition GRANTED. Justice Sotomayor took no part in the consideration or decision of this petition.
Dec 16 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
Dec 17 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Dec 28 2009	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including January 19, 2010.
Dec 28 2009	The time within which to file respondent's brief on the merits is extended to and

including February 19, 2010.

Jan 4 2010 SET FOR ARGUMENT ON Monday, March 29, 2010.

Jan 19 2010 Brief of petitioners Robert Morrison, et al. filed.

Jan 19 2010 Joint appendix filed (with supplemental volume).

Jan 26 2010 Brief amici curiae of Australian Shareholders' Association, et al. filed.

Jan 26 2010 Brief amici curiae of Mn Services Vermogensbeheer B.V., et al. filed.

Jan 26 2010 Brief amici curiae of Alecta Pensionsforsakring, et al. filed.

Feb 16 2010 Record received from U.S.C.A. for 2rd Circuit. (1 envelope)

Feb 19 2010 Brief of respondents National Australia Bank Ltd., et al. filed. (Distributed)

Feb 23 2010 CIRCULATED.

Feb 25 2010 Brief amicus curiae of Organization for International Investment filed. (Distributed)

Feb 25 2010 Brief amicus curiae of United Kingdom of Great Britain and Northern Ireland filed. (Distributed)

Feb 26 2010 Brief amicus curiae of United States filed. (Distributed)

Feb 26 2010 Brief amicus curiae of International Chamber of Commerce, et al. filed. (Distributed)

Feb 26 2010 Brief amicus curiae of Competitive Enterprise Institute filed. (Distributed)

Feb 26 2010 Brief amici curiae of European Aeronautic Defence & Space Co. N.V., et al. filed. (Distributed)

Feb 26 2010 Brief amici curiae of Professors and Students of the Yale Law School Capital Markets and Financial Instruments Clinic filed. (Distributed)

Feb 26 2010 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Feb 26 2010 Brief amicus curiae of Infineon Technologies AG filed. (Distributed)

Feb 26 2010 Brief amicus curiae of Republic of France filed. (Distributed)

Feb 26 2010 Brief amicus curiae of Government of the Commonwealth of Australia filed. (Distributed)

Feb 26 2010 Brief amicus curiae of NYSE Euronext filed. (Distributed)

Feb 26 2010 Brief amici curiae of Securities Industry and Financial Markets Association, et al. filed. (Distributed)

Feb 26 2010 Brief amici curiae of Law Professors filed. (Distributed)

Feb 26 2010 Brief amicus curiae of Washington Legal Foundation filed. (Distributed)

Feb 26 2010 Brief amici curiae of Institute of International Bankers, et al. filed. (Distributed)

Mar 9 2010 Supplemental brief of petitioners Robert Morrison, et al. filed. (Distributed)

Mar 17 2010 Record from U.S.D.C. for Southern District of New York is electronic.

Mar 19 2010 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.

Mar 19 2010 Supplemental brief of respondents National Australia Bank Ltd., et al. filed. (Distributed)

Mar 19 2010 Reply of petitioners Robert Morrison, et al. filed. (Distributed)

Mar 23 2010 Record received from U.S.D.C. for Southern District of New York.

Mar 29 2010 Argued. For petitioners: Thomas A. Dubbs, New York, N. Y. For respondents: George T. Conway, III, New York, N. Y.; and Matthew D. Roberts, Assistant to

the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
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No. 08-

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States, its American Depository Receipts were traded on the New York Stock Exchange and its financial statements were filed with the Securities Exchange Commission ("SEC"); and (b) the claims arose from a massive accounting fraud perpetrated by American citizens at the parent company's Florida-based subsidiary and were merely reported from overseas in the parent company's financial statements.

II. Whether this Court, which has never addressed the issue of whether subject matter jurisdiction may extend to claims involving transnational securities fraud, should set forth a policy to resolve the three-way conflict among the circuits (*i.e.*, District of Columbia Circuit versus the Second, Fifth and Seventh Circuits versus the Third, Eighth and Ninth Circuits).

III. Whether the Second Circuit should have adopted the SEC's proposed standard for determining the proper exercise of subject matter jurisdiction in transnational securities fraud cases, as set forth in the SEC's amicus brief submitted at the request of the Second Circuit, and whether the Second Circuit should have adopted the SEC's finding that subject matter jurisdiction exists here due to the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies or non wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Second Circuit (App. 1a) is published at 547 F.3d 167. The district court's order (App. 23a) is reported at 2006 WL 3844465.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2008. On January 13, 2009, Justice Ginsburg granted an extension of time until March 23, 2009, in which to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. §1254(i).

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1337 as well as Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and

SEC Rule 10b-5 promulgated thereunder, are reproduced at App., 78a-79a.

STATEMENT OF THE CASE

A. Summary of the Argument

The text of the Securities Exchange Act of 1934 ("Exchange Act") is silent as to the transnational reach of the statute. *See, e.g., Itoba Ltd. v. LEP Group, LLC*, 54 F.3d 118, 121 (2d Cir. 1995). But since the enactment of the Exchange Act, courts in every circuit have recognized that "subject matter jurisdiction may extend to claims involving transnational securities fraud." *S.E.C. v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). As Judge Henry J. Friendly noted more than 30 years ago, "Congress [did not] intend to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975). Yet during the many years in which the Exchange Act has been on the books, this Court has never construed this central and often determinative issue of subject matter jurisdiction in the context of the federal securities laws.

Meanwhile, the Seventh Circuit has observed the disarray among the circuits, noting that the circuits have adopted divergent approaches to a widely-used test to determine the existence of subject matter jurisdiction in securities fraud cases: the so-called "conduct test." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 663-65

(7th Cir. 1998). The conduct test focuses "on the nature of [the] conduct within the United States as it relates to carrying out the alleged fraudulent scheme," *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983), on the theory, as first expressed by Judge Friendly, that "Congress would not want the United States to become a base for fraudulent activity harming foreign investors." *Europa & Overseas Commodity Traders, S.A. v. Banque Poriba London*, 147 F.3d 118, 125 (2d Cir. 1998). The Seventh Circuit, in observing the disarray among the circuits, stated "[a]lthough the Circuits that have confronted the matter seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, *agreement appears to end at that point*." *Kauthar SDN BHD*, 149 F.3d at 665 (emphasis added).

The District of Columbia Circuit has developed the most restrictive approach under the conduct test, and requires that the domestic conduct at issue must *itself* constitute a securities violation. The Third, Eighth and Ninth Circuits are at the opposite end, requiring only that at least *some* activity designed to further a fraudulent scheme occur within the United States. The Second, Fifth and Seventh Circuits have adopted a middle ground between these two positions, requiring that the domestic conduct in question be more than merely preparatory to

the fraud and that it be a direct cause of the loss in question.[1]

The SEC, in its amicus brief submitted to the Second Circuit panel, rejected the District of Columbia Circuit's restrictive approach and proposed the following standard to assess whether the antifraud provisions apply to transnational securities fraud cases:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

App. 48a. The SEC believed that, applying the standard to the allegations in petitioners' complaint, "material and substantial conduct in furtherance of the alleged fraud occurred in the United States so as to support application of the antifraud provisions . . . ." App. 49a-50a.

As the SEC noted in its amicus brief, "[t]hese type of suits have become more prevalent in recent years." App.

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[1] This disarray is shown by the fact that within days of the Second Circuit's decision in this case, a court in the Eleventh Circuit reached the opposite holding on virtually the same facts. *See In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-27T, 2008 WL 4663363, at *2 (M.D. Fla. Oct. 21, 2008) (court exercised jurisdiction over securities claims involving financial fraud at a Tampa, Florida-based subsidiary that were reported in financial statements of parent company in England).

at 51a (citing *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005); *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546, 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004); *Froese v. Staff*, No. 02 CV 5744, 2003 WL 21523979 (S.D.N.Y. July 7, 2003); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999)). Indeed, the timeliness of the issue is underscored by the export to foreign jurisdictions of the Bernard Madoff Ponzi scheme, which has recently given rise to various class actions on behalf of foreign investors. *See, e.g., Inversiones Mar Octava Limitada v. Banco Santander, S.A.*, No. 09 Civ. 20215 (S.D.N.Y. filed Jan. 26, 2009).

It is time for this Court to resolve the divergent conduct test approaches among the circuits. The Exchange Act and its role in transnational securities fraud is too important an issue in the current world-wide economic crisis to allow the lower courts to continue floundering in disarray with divergent standards. This case presents an ideal vehicle for bringing order to the conduct test standards since this case implicates the current split of authority and involves only this one issue.

B. Summary of the Case

Respondent National Australia Bank ("NAB") is organized under the laws of Australia and, at all relevant times, was that country's largest bank. NAB's ordinary shares trade on the Australian securities exchanges, and

its American Depositary Receipts ("ADRs")[2] were intentionally created to trade on the New York Stock Exchange ("NYSE"). Respondent Frank Cicutto was Chief Executive officer of NAB until February 2004.

Respondent HomeSide Lending, Inc. ("HomeSide") was at one time the sixth largest mortgage servicer in the United States and at all relevant times was a wholly-owned subsidiary of NAB, and was located in Jacksonville, Florida.[3] HomeSide was a mortgage service provider, meaning it serviced mortgages in return for a fee. Respondents Harris, Race and Wilson served as HomeSide's Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer, respectively, from April 1999 until each man "resigned" on September 4, 2001.

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[2] An "ADR" is a negotiable certificate issued by a United States depositary bank that represents a specified number of shares of a foreign security that have been deposited with a foreign branch or agent of the depositary. ADRs are registered with the SEC and are governed by the provisions of the federal securities laws. In particular, NAB was required to file with the SEC Forms 6 and 20, which are nearly analogous to Forms 10-Q and 10K filed with the SEC by United States corporations. It is not disputed that the ADRs were traded on the NYSE although they are not encompassed within the proposed plaintiff class.

[3] After the stunning revelation in September 2001 of the A$3.05 billion writedown that NAB was forced to book, NAB sold HomeSide to Washington Mutual, Inc. In September 2008, J.P. Morgan Chase & Co. purchased the banking assets of Washington Mutual, Inc.

Petitioners alleged that Harris, Race and Wilson, then residents of Florida, violated the federal securities laws by intentionally overvaluing HomeSide's portfolio with the selection of unduly aggressive mortgage prepayment speeds, in violation of Generally Accepted Accounting Principles, which respondents knew were incorrect and which were chosen solely in order to achieve over-inflated earnings targets. When the accounting fraud was uncovered and disclosed on September 3, 2001, NAB announced two massive writedowns totaling well over three billion Australian dollars.

While NAB claimed that the problems at HomeSide were caused by inadvertent errors or mere mistakes, the real reason for the writedown and restatement was fraud. Several employees and top executives at HomeSide had been cooking HomeSide's books since at least April 1999. Based, in part, on an analysis of HomeSide's internal computer data produced by former employees who acted as "whistleblowers", petitioners alleged that there was a consistent manipulation of key data in HomeSide's valuation models. HomeSide executives Harris, Race and Wilson, along with others, had deliberately overvalued HomeSide's mortgage portfolio – its only real asset. This overvaluation occurred in a declining interest rate environment in which customers were refinancing and paying off mortgages that were being serviced by HomeSide – by hundreds of millions of dollars – and HomeSide's only real asset, its mortgage servicing rights, was disappearing.

HomeSide's fraudulent financial information was then transmitted to NAB in Australia. NAB incorporated this fraudulent information into its annual reports, reprinting the fraudulent financial statements of HomeSide *line-by-line. Every false statement made by NAB concerning HomeSide's operations, results and value was a repetition of the false financial information that HomeSide concocted in Florida for the very purpose of misleading NAB's shareholders about HomeSide's value and financial results.*

C. The Decisions Below

Notwithstanding uncontroverted proof of the perpetration of the fraud in Florida, documented and corroborated by the internal records of HomeSide provided to counsel by confidential witnesses, the district court, in an Opinion entered on October 26, 2004, dismissed the securities claims of Owen and the Silverlocks, on the grounds that the district court did not have subject matter jurisdiction over the foreign plaintiffs' claims. App. 42a.

The district court entered final judgment on January 16, 2007.

A three-judge panel of the Second Circuit heard oral argument on July 18, 2008. The panel invited the SEC to submit an amicus brief to offer "the view of the [SEC] on both the broader questions posed by this case and the case itself" as to whether the antifraud provisions of the United States securities laws apply to transnational fraud. App. 48a. As previously noted, the SEC believed the instant

case supported the application of the antifraud provisions of the Exchange Act.

The Second Circuit, without any analysis of the SEC's position, held that there was no subject matter jurisdiction. Instead, the panel explained that "[t]he issue for us to resolve here boils down to what conduct comprises the heart of the alleged fraud." App. 18a.

The Second Circuit panel summarized petitioners' position as follows:

> [Petitioners] assert that the alleged manipulation of the MSR by HomeSide in Florida made up the main part of the fraud since those false numbers constituted the misleading information passed on to investors through NAB's public statements. According to [petitioners], if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5.

App. 18a.

The panel, per an opinion authored by Judge Barrington D. Parker, Jr., unanimously affirmed the district court and held, contrary to Judge Friendly's admonition, that the locus of the statement determined whether subject matter jurisdiction existed, rather than the locus of the conduct that comprised the fraud. App. 19a.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts of Appeals Are Deeply Fractured Over Subject Matter Jurisdiction Involving Transational Securities Fraud

A. The Exchange Act Does Not Address Jurisdiction Over Transnational Securities Fraud

While Congress may prescribe the extent of federal jurisdiction over actions to enforce the federal securities laws, so long as it does not violate the broad limits of the due process clause, *see, e.g., Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972), Congress, in the Exchange Act, said little that bears on the issue. As one court noted, the provisions of the Exchange Act "frame a fairly broad grant of jurisdiction, but they furnish no specific indications of when American federal courts have jurisdiction over securities law claims arising from [transnational] transactions." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 29-30 (D.C. Cir. 1987). In analyzing Congressional silence regarding transnational securities fraud in the Exchange Act, Judge Friendly observed that "[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later . . . ." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975).

However, the federal courts have not confined jurisdiction to securities transactions consummated in the

United States. "It is elementary that the anti-fraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets." *Europe & Overseas Commodity Traders*, 147 F.3d at 123. Indeed, the courts plainly recognize that "subject matter jurisdiction may extend to claims involving transnational securities frauds." *S.E.C. v. Berger*, 322 F.3d at 192.

B. The Circuits Have Adopted Three Different Approaches To The "Conduct Test" At Issue

Two tests have emerged to determine the reach of the antifraud provisions of the Exchange Act: the "effects test" and the "conduct test." Subject matter jurisdiction may be obtained by satisfying either test alone or by an "admixture or combination of the two." *Itoba Ltd.*, 54 F.3d at 122. The effects test focuses on whether domestic investors or markets are affected as a result of actions occurring outside the United States. *Europe & Overseas Commodity Traders*, 147 F.3d at 125. Under the "conduct test," subject matter jurisdiction exists over "conduct occurring predominately in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." *Restatement (Second) of Foreign Relations of the United States* §416(1)(d) (1987). This is true "even as applied to securities sold outside the United States or to persons who are not United States nationals or residents." *Id.* cmt. a.

Several methodologies have been devised to determine when, under the conduct test, American courts have jurisdiction over domestic conduct that is alleged to

have played some part in the preparation of a transnational securities fraud. However, "[t]he chronic difficulty with [the conduct test] has been describing, in sufficiently precise terms, the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction." *Kauthar SDN BHD*, 149 F.3d at 665. "Indeed, the circuits that have confronted the matter have articulated a number of methodologies." *Id.*

The District of Columbia Court of Appeals has advanced the most restrictive approach under the conduct test, holding that the domestic conduct at issue must itself constitute a securities violation. *Zoelsch*, 824 F.2d at 31. ("[J]urisdiction will be in American courts where the domestic conduct comprises *all the elements of a defendant's conduct* necessary to establish a violation of Section 10(b) and Rule 10b-5")(emphasis added).

At the other end of the spectrum, the Third, Eighth and Ninth Circuits, while also focusing on whether the United States-based conduct causes the plaintiff's loss, "generally require *some lesser quantum of conduct.*" *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 906 (emphasis added). The Third Circuit, in *S.E.C. v. Kasser*, 548 F.2d 109 (3d Cir. 1977), held that the conduct comes within the scope of the Exchange Act if "at least *some activity* designed to further a fraudulent scheme occurs within the country." *Id.* at 114 (emphasis added). The Eighth Circuit, in *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979), held that the Exchange Act provisions were applicable

when the domestic conduct "was in furtherance of a fraudulent scheme and was *significant with respect to its accomplishment.*" *Id.* at 421 (emphasis added). The Ninth Circuit adopted the Eighth Circuit's standard set forth in *Continental Grain (Austl.) Pty. Ltd.* in *Gruenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983).

The Second, Fifth and Seventh Circuits have set a mid-course between the two extremes of the District of Columbia Circuit, on the one hand, and the Third, Eighth and Ninth Circuits, on the other hand. The Second Circuit, in this case, recently reiterated "that our 'conduct test' requires that 'the defendant's conduct in the United States [be] more than merely preparatory to the fraud, and [that] particular acts or culpable failures to act within the United States directly cause[ ] losses to foreign investors abroad' for subject matter jurisdiction to exist." *Morrison v. National Austl. Bank*, 547 F.3d 167, 173 n.6 (2d Cir. 2008).

Similarly, in *Robinson*, the Fifth Circuit held that the conduct test requires that the domestic conduct in question be: (1) more than merely preparatory to the fraud, and (2) a direct cause of the loss in question. *Robinson*, 117 F.3d at 906-07.

The Seventh Circuit, in *Kauthar SDN BHD*, aligned itself with the Second and Fifth Circuits' "conduct test" methodology and held that its approach:

> represents the same midground as that identified by the Second and Fifth Circuits. . . . [W]e would do serious violence to the

> policies of these statutes if we did not recognize our country's manifest interest in ensuring that the United States is not used as a "base of operations" from which to "defraud foreign securities purchasers or sellers." *Kasser*, 548 F.2d at 116. This interest is amplified by the fact that we live in an increasingly global financial community. The Second and Fifth Circuit's iterations of the test embody a satisfactory balance of these competing considerations.

Kauthar SDN BHD, 149 F.3d at 667.

C. The Conflict Is Entrenched

The conflict between the circuits is entrenched, with different circuits choosing to follow different approaches and rejecting the approaches formulated by other circuits – and reaching differing results as a consequence. As the Seventh Circuit has observed, "[a]lthough the Circuits that have confronted the matter seem to agree that there are some transnational situations to which the antifraud provisions of the securities laws are applicable, agreement appears to end at that point." *Kauthar SDN BHD*, 149 F.3d at 665.

In view of such an entrenched conflict, resolution of the conflict by this Court is warranted.

II. This Case Is An Excellent Vehicle For Addressing The "Conduct Test"

The context of this case afford an ideal opportunity to resolve the reach of the Exchange Act provisions to transnational securities fraud under the "conduct test". The issue is the sole ground upon which the Second Circuit's decision is based. Furthermore, although the Fifth and Seventh Circuits follow the Second Circuit's approach to the "conduct test," the result would have been different in other circuits.

As the *Kasser* case above demonstrates, petitioners would prevail under the test used in the Third Circuit because "at least some activity designed to further a fraudulent scheme occur[red] within the country." *Kasser*, 548 F.2d at 114. Petitioners also would prevail in the Eighth and Ninth Circuits because the domestic conduct alleged here "was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment." *Continental Grain (Austl.) Pty. Ltd.*, 592 F.2d at 421. Indeed, all of the fraud alleged in the Complaint, except for publication, occurred in Florida.

III. As Recognized By The SEC, Resolution Of The Split Among The Circuits Is Necessary Now

This Court should not allow uncertainty over how to implement the "conduct test" to persist in the federal circuits any longer.

First, the issue has already percolated in the federal appeals courts. As shown above, seven circuits have

addressed this issue, and three different tests have emerged. The issue has been laid out by the appellate courts below; it is time for this Court to rule.

Second, the extraterritorial application of the antifraud provisions of the federal securities laws is an important issue, implicating serious policy concerns. As the Third Circuit noted in adopting its "conduct" test standard, "it should be recognized that this case in a large measure calls for a policy decision" as to the extent the United States should police domestic conduct aimed at foreign investors. *Kasser*, 548 F.2d at 116.

Third, as shown above, the Exchange Act and its legislative history are silent on the issue of extraterritorial application. There is no language foreclosing it; nor is there any language defining its scope. This Court is the *only* vehicle for a definitive resolution of this important issue.

Fourth, as noted above, courts in different circuits are reaching different results on essentially identical facts. Indeed, within two days of the Second Circuit's decision in this case, a court in the Eleventh Circuit reached the opposite holding on virtually the same facts. *See In re CP Ships Ltd. Sec. Litig.*, 2008 WL 4663363, at *2 (court exercised jurisdiction over securities claims involving financial fraud at Tampa, Florida-based subsidiary that were reported in financial statements of parent company in England).

Finally, the incidence of transnational fraud has changed dramatically. Due to advances in electronic

communications and global financial liberalization, isolated financial markets have merged into an interconnected financial marketplace. Many corporations, including NAB, have become global citizens. Thus, any fraud, as most recently exemplified by the Madoff Ponzi scheme, affect investors and markets in multiple nations. As transnational fraud increases, guidance from the Court becomes even more crucial.

IV. As The SEC Noted, The Second Circuit's Case-By-Case Application Of The "Conduct Test" Has Left "Uncertainty In The District Courts"

As the SEC noted in its *amicus brief*, the Second Circuit's case law on the "conduct test" can be read to set forth a series of 'diverse formulations' of the applicable legal standard. App. 49a (quoting *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 73-74 (S.D.N.Y. 2005)). The district court in *Alstom* noted that there has been an "apparent shift in emphasis from a test of strict causation" – one where the domestic conduct must be the immediate cause of the overseas investors' losses – "to one of materiality of the domestic acts." *Id.* This has created a "tension" in the case law, *id.*, and, as a result, courts have largely resorted to engaging in a case-by-case comparison of the specific fact patterns to those of existing Second Circuit precedent. The district court in this case similarly noted that "[t]he complexity of th[is] required analysis means that individual cases are decided on very fine distinctions." App. 32a.

As previously noted, the SEC proposed the following standard to assess whether the antifraud provisions apply to transnational securities fraud cases:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

App. 48a.

In support of its proposal, the SEC explained that:

> The Commission believes that this Court could bring greater clarity to this area by adopting the proposed formulation. Furthermore, because this jurisdictional test would also be applied to Commission actions, *see SEC v. Berger*, 322 F.3d 187, 193-94 (2d Cir. 2003), we believe that the proposed standard would help preserve the Commission's ability to bring an enforcement action involving future transnational frauds such as the one alleged in the case.

App. 49a.

In essence, the SEC recommended that the Second Circuit adopt a "conduct test" standard that was more

aligned with the Third, Eighth and Ninth Circuits. However, the Second Circuit, after inviting the views of the SEC, did not address, analyze or mention the SEC proposed standard in its opinion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court may also want to consider calling for the views of the SEC through the Soliciter General.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 23, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: July 18, 2008 Decided: October 23, 2008)

Docket No. 07-0583-cv

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Plaintiffs-Appellants,

MARIA KENNEDY, HARVARD B. KOLM and NORMAN HAUGE,

Plaintiffs,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Defendants-Appellees.

Appendix A

Before: NEWMAN, CALABRESI, B.D. PARKER, *Circuit Judges.*

BARRINGTON D. PARKER, *Circuit Judge*:

BACKGROUND

This appeal requires us to revisit the vexing question of the extraterritorial application of the securities laws, Rule 10b-5 in particular. Founded in 1858, headquartered in Melbourne, and incorporated under Australian law, the National Australia Bank ("NAB") calls itself Australia's largest bank. In 2000, its Australian business accounted for roughly 55% of its assets and revenues, with its international operations responsible for the remainder. NAB's approximately 1.5 billion "ordinary shares" (the equivalent of American common stock) trade on the Australian Securities Exchange, the London Stock Exchange, the Tokyo stock exchange, and the New Zealand stock exchange. While NAB's ordinary shares do not trade on United States exchanges, its American Depository Receipts[1] ("ADRs") trade on the New York Stock Exchange.

In February 1998, NAB acquired HomeSide Lending Inc., an American mortgage service provider headquartered in Jacksonville, Florida, for $1.22 billion.

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1. ADRs are issued by U.S. depository banks and represent "one or more shares of foreign stock or a fraction of a share. If you own an ADR, you have the right to obtain the foreign stock it represents." U.S. Securities and Exchange Commission website at http://www. sec. gov/ answers/ adrs. htm

Appendix A

HomeSide serviced mortgages in exchange for fees. By March of 2000, HomeSide, as a wholly owned subsidiary of NAB, held the rights to service $18 billion of mortgages, making it America's sixth biggest mortgage service company.

Following the acquisition, HomeSide's operations were profitable. In HomeSide's first year, it earned A$313[2] million in mortgage servicing fees, and contributed to NAB's net profits. In 1999, NAB announced A$153 million in profits from HomeSide, which accounted for approximately 5.4% of NAB's A$2.82 billion in profits for the year. For the 2000 fiscal year, NAB reported that HomeSide generated A$141 million in profits, 4.1% of its total profits of A$3.37 billion.

HomeSide's accounting practices spawned this litigation. HomeSide calculated the present value of the fees it would generate from servicing mortgages in future years using a valuation model, booked that amount on its balance sheet as an asset called Mortgage Servicing Rights ("MSR"), and then amortized the value of that asset over its expected life.

In 2001, NAB revealed that the interest assumptions in the valuation model used by HomeSide to calculate the MSR were incorrect and resulted in an overstatement in the value of its servicing rights. In July 2001, NAB disclosed that it would incur a $450 million write-down due to a recalculation in the value of

2. A$ signifies Australian dollars.

HomeSide's MSR. NAB's ordinary shares and its ADRs both fell more than 5% on the news. In September 2001, NAB announced a second write-down of $1.75 billion of the value of HomeSide's MSR, causing NAB's ordinary shares to plummet by 13% and its ADRs to drop by more than 11.5% on the NYSE. In an amended Form 10-Q filed with the SEC in December 2001, NAB restated previously issued financial statements to reflect the July and September adjustments.

Plaintiffs, four individuals who purchased NAB shares, sued NAB, HomeSide, and various individual officers and directors (collectively "Defendants") in the Southern District of New York, alleging violations of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. The Plaintiffs claimed that "NAB's subsidiary HomeSide knowingly used unreasonably optimistic valuation assumptions or methodologies" and that various of the Defendants made materially false and misleading statements in SEC filings, annual reports and press releases regarding HomeSide's profitability, economic health, and its contribution to NAB. HomeSide allegedly falsified the MSR in Florida and then sent the data to NAB in Australia, where NAB personnel disseminated it via public filings and statements.

Three of the plaintiffs who purchased their shares abroad (Russell Leslie Owen, Brian Silverlock, and Geraldine Silverlock) ("Foreign Plaintiffs") sought to represent a class of nonAmerican purchasers of NAB

ordinary shares, while the fourth plaintiff, Robert Morrison ("Domestic Plaintiff"), who purchased ADRs, sought to represent a class of American purchasers during a proposed class period of April 1, 1999 through September 3, 2001.

Defendants moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at *1, 2006 U.S. Dist. LEXIS 94162, at *3 (S.D.N.Y. Oct. 25, 2006). The district court (Jones, *J.*) granted the motion, and dismissed the claims of the Foreign Plaintiffs for lack of subject matter jurisdiction and those of the Domestic Plaintiff for failure to state a claim.[3] This appeal followed.

DISCUSSION

I.

"Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory

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3. The district court dismissed the Domestic Plaintiff's claims due to Morrison's failure to allege that he suffered damages from the alleged fraud. *See In re Nat'l Austl. Bank Sec. Litig.*, 2006 WL 3844465, at *8, 2006 U.S. Dist. LEXIS 94162, at *26-27. On this appeal, Plaintiffs-Appellants focus exclusively on the claims of the Foreign Plaintiffs and do not challenge the dismissal of the Domestic Plaintiff's claims.

or constitutional power to adjudicate it." *Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir.2008) (internal citations and quotation marks omitted). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000). "In reviewing a district court's dismissal of a complaint for lack of subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*." *Maloney v. Soc. Sec. Admin.*, 517 F.3d 70, 74 (2d Cir.2008) (per curiam). "[T]he court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff," *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir.2006) (citation and internal quotation marks omitted), but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir.2003). In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) a district court may consider evidence outside the pleadings. *Makarova*, 201 F.3d at 113.

"Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (citing U.S. Const., art. III, § 1). When Congress wrote the Securities Exchange Act, however, it omitted any discussion of its application to transactions taking place

outside of the United States.[4] *See Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir.1995) ("It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application." (citing *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.1991)). Therefore, when faced with securities law claims with an international component, we turn to "the underlying purpose of the anti-fraud provisions as a guide" to "discern 'whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to' such transactions." *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir.1998) (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.1975)). The underlying purpose of Section 10(b) is "to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors." *Id.* (citing H.R.Rep. No. 1838, at 32-33 (1934)). Harm to domestic interests and domestic investors has not been the exclusive focus of the anti-fraud provisions of the securities laws. As our case law makes clear, we believe that it is consistent with the statutory scheme to infer that Congress would have wanted "to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States." *Id.*; *see also Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir.1989); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *reheard as to merits without reconsideration of jurisdiction*, 405 F.2d 215, 217 *(en banc* 1968).

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4. We respectfully urge that this significant omission receive the appropriate attention of Congress and the Securities and Exchange Commission.

Appendix A

We decided in *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir.1983), that in determining the extraterritorial reach of Section 10(b) we look to whether the harm was perpetrated here or abroad and whether it affected domestic markets and investors. This binary inquiry calls for the application of the "conduct test" and the "effects test." *Id.*[5] We ask: (1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens. *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir.2003); *Psimenos*, 722 F.2d at 1045. Where appropriate, the two parts of the test are applied together because "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Itoba Ltd.*, 54 F.3d at 122. In this case, however, Appellants rely solely on the conduct component of the test.

Under the "conduct" component, subject matter jurisdiction exists if activities in this country were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad. *See Alfadda*, 935 F.2d at 478; *Psimenos*, 722 F.2d at 1045-46; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir.1975). Our determination of whether American activities "directly" caused losses to foreigners depends on what and how

5. We first applied the effects test in *Schoenbaum*, 405 F.2d at 206, and the conduct test in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir.1972).

much was done in the United States and on what and how much was done abroad. *See IIT, Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir.1980).

Here, HomeSide allegedly manipulated its internal books and records and sent the falsely inflated numbers from Florida to NAB's headquarters in Australia. NAB, operating from Australia, created and distributed its public filings and related public statements from Australia. These public filings and statements included HomeSide's falsified numbers in two ways. NAB directly included some of the allegedly false HomeSide numbers as stand-alone numbers in public filings. NAB also incorporated allegedly false HomeSide numbers in company-wide figures (*e.g.*, company-wide revenue, profit, and growth numbers), rendering them false to the extent that they depended on the artificially inflated numbers from HomeSide.

Appellants contended that the fraud occurred primarily in Florida because HomeSide was located there and the false numbers at issue were created there. The district court disagreed. In what it described as a "close call," the district court determined that HomeSide's knowing use of unreasonably optimistic assumptions to artificially inflate the value of its MSR could not serve as a predicate for subject matter jurisdiction because this conduct amounted to, at most, a link in the chain of a scheme that culminated abroad. The district court reasoned that there would have been no securities fraud "but-for (i) the allegedly knowing incorporation of HomeSide's false information; (ii) in

public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad." *In re Nat'l Austl. Bank Sec. Litig.*, 2006 WL 3844465, at *8, 2006 U.S. Dist. LEXIS 94162, at *25. Accordingly, the district court determined that "[o]n balance, it is the foreign acts—not any domestic ones—that 'directly caused' the alleged harm here." *Id.* at *8, U.S. Dist. LEXIS 94162, at *26. It concluded that the Plaintiffs failed to meet "their burden of demonstrating that Congress intended to extend the reach of its laws to the predominantly foreign securities transactions at issue here." *Id.* *8, U.S. Dist. LEXIS 94162, at *25.

II.

The district court believed that the difficulty of this case is heightened by its novelty. Here, a set of (1) *foreign* plaintiffs is suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries. This is the first so-called "foreign-cubed" securities class action to reach this Circuit. *See* Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, *in* Corporate Law and Practice Handbook Series (Number B-1442) 91, 96 (Practicing Law Institute ed., 2004) (coining the term "foreign-cubed"); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14 (2007) (analyzing the concept of a "foreign-cubed" securities class action). But despite this unusual fact-

pattern, the usual rules still apply. As we noted, subject matter jurisdiction exists over these claims only "if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." *Alfadda*, 935 F.2d at 478.

Our Circuit's current standard for determining whether we possess subject matter jurisdiction over transnational securities fraud largely grew out of a series of opinions we issued between 1968 and 1983.[6] Two of

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6. A degree of confusion appears to exist in the other Circuits regarding our standard. In *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C.Cir.1987), the D.C. Circuit hypothesized that "[t]he Second Circuit's rule seems to be that jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5: the fraudulent statements or misrepresentations must originate in the United States, must be made with scienter and in connection with the sale or purchase of securities, and must cause the harm to those who claim to be defrauded, even though the actual reliance and damages may occur elsewhere." The Fifth Circuit has since taken issue with that characterization. *See Robinson v. TCI/US W. Commc'ns*, 117 F.3d 900, 905 n.10 (5th Cir.1997) ("Some courts, including the District of Columbia Circuit in *Zoelsch*, have suggested that the Second Circuit's test requires all elements of the alleged fraud to have occurred domestically .... [T]his is a bit of an overstatement: A close examination of the Second Circuit's caselaw reveals that the real test is simply whether material domestic conduct directly caused the complained-of loss."). To clear up any confusion, we

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these cases, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.1975), and *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir.1975), both written by Judge Friendly, are particularly helpful.

Bersch involved the offering of shares in IOS, a Canadian mutual fund, to non-Americans via a prospectus distributed outside of the United States, which the plaintiffs in the action asserted contained misleading statements and omissions. *Bersch*, 519 F.2d at 980. Of the six investment banks that underwrote the offering, two were headquartered in America, as was Arthur Andersen, IOS's primary accounting firm. *Id.* at 979-80. IOS, the underwriters, and their attorneys and accountants met on many occasions in New York to initiate, organize, and structure the offering; parts of the prospectus were drafted in New York and read over the telephone to personnel at the main business office of IOS in Geneva, Switzerland; and the proceeds of the offering were deposited in New York before being distributed to IOS. *Id.* at 978, 985 n.24. We concluded that we did not have subject matter jurisdiction because

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reiterate that our "conduct test" requires that "the defendant's conduct in the United States [be] more than merely preparatory to the fraud, and [that] particular acts or culpable failures to act within the United States directly cause[ ] losses to foreign investors abroad" for subject matter jurisdiction to exist. *Alfadda*, 935 F.2d at 478. We disavow the D.C. Circuit's characterization of our test as requiring the domestic conduct to comprise all the elements necessary to establish a violation of Rule 10b-5.

the fraud itself consisted of the delivery of the fraudulent prospectus to investors and the final prospectus emanated from a foreign source (London, Brussels, Toronto, the Bahamas, or Geneva). *Id.* at 987. Despite the fact that meetings and work regarding the prospectus took place in New York, we concluded that those actions were "merely preparatory" or took the "form of culpable nonfeasance and are relatively small in comparison to those abroad." *See id.*

In *Vencap*, which involved the allegedly fraudulent sale of foreign securities to a British investment trust, with certain actions taken in the United States, we determined that the findings of the district court did not provide enough information for us to determine subject matter jurisdiction. We did, however, observe that a fundamental consideration in determining whether conduct gives rise to subject matter jurisdiction is that the United States should not be "used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners," as "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." *Vencap, Ltd.*, 519 F.2d at 1017.

Bersch and *Vencap* illustrate how to approach subject matter jurisdiction under the "conduct test": identify which action or actions constituted the fraud and directly caused harm—in the case of *Bersch*, the act of placing the allegedly false and misleading prospectus "in the purchasers' hands," *Bersch*, 519 F.2d

at 987—and then determine if that act or those actions emanated from the United States. *See Vencap, Ltd.*, 519 F.2d at 1017. Since then we have repeatedly applied these principles. *See, e.g., Itoba Ltd.*, 54 F.3d at 122; *Alfadda*, 935 F.2d at 478; *Psimenos*, 722 F.2d at 1045.

We most recently applied them in *SEC v. Berger*, 322 F.3d 187 (2d Cir.2003). There, the Manhattan Investment Fund, an offshore investment company organized under the laws of the British Virgin Islands and run by a single active director (Berger), suffered losses in excess of $300 million. *Id.* at 188-89. Instead of reporting these losses, Berger, working in New York, created fraudulent account statements that "vastly overstated" the market value of the Fund's holdings. *Id.* at 189. Berger sent these fraudulent account statements to the fund administrator in Bermuda and ordered the administrator to send to investors the fraudulent statements rather than the accurate ones supplied by Bear Stearns. *Id.* We held that we had subject matter jurisdiction under the "conduct test" because the "fraudulent scheme was masterminded and implemented by Berger in the United States," *id.* at 194, even though the statements that ultimately conveyed the fraudulent information to investors were mailed from Bermuda. The critical factor was that the conduct that directly caused loss to investors—the creation of the fraudulent statements—occurred in New York.

Determining what is central or at the heart of a fraudulent scheme versus what is "merely preparatory"

or ancillary can be an involved undertaking. Appellees and certain of the *amici curiae* urge us to eschew this analysis in favor of a bright-line rule. They urge us to rule that in so-called "foreign-cubed" securities actions, showing domestic conduct should never be enough and subject matter jurisdiction cannot be established where the conduct in question has no effect in the United States or on American investors. They contend that the general "presumption" against the extraterritorial application of American laws bars American courts from exercising subject matter jurisdiction over these types of claims. *See, e.g., Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 127 S.Ct. 1746, 1758, 167 L.Ed.2d 737 (2007) (referring to the "presumption that United States law governs domestically but does not rule the world"); *Smith v. United States*, 507 U.S. 197, 113 S.Ct. 1178, 1183, 122 L.Ed.2d 548 (1993) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (citation and internal quotation marks omitted); *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 70 (2d Cir.1994) ("[W]e must presume that Congress intended its enactments to apply only within the territorial jurisdiction of the United States unless the legislation reflects a contrary intent.").

In support of their position, Appellees and *amici* point to a parade of horribles that they claim would result if American courts exercised subject matter jurisdiction over such actions. They contend that this would, among other things, undermine the competitive

and effective operation of American securities markets, discourage cross-border economic activity, and cause duplicative litigation. Their principal objection, though, is that entertaining such actions here would bring our securities laws into conflict with those of other jurisdictions. For instance, in Switzerland, no comprehensive federal legislation governs securities fraud, and private remedies are the only ones available. In Canada, securities class actions are recognized, but most provinces do not recognize the fraud on the market doctrine. In various other countries, class actions are either not available or the ability of class actions to preclude further litigation is problematic. *See, e.g.*, David A. Skeel, Jr., *Can Majority Voting Provisions Do It All?*, 52 Emory L.J. 417, 423 (2003) (noting that "most other countries do not have procedural devices that are even remotely similar to the U.S. class action"); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 Duke J. Comp. & Int'l L. 369, 372 (2001) (observing that "class actions do not exist in Germany, Switzerland, and most other countries of the civil law system"). In essence, Appellees argue that other countries have carefully crafted their own, individual responses to securities litigation based on national policies and priorities and that opening American courts to such actions would disrupt and impair these carefully constructed local arrangements.

However, the potential conflict between our anti-fraud laws and those of foreign nations does not require the jettisoning of our conduct and effects tests for "foreign-cubed" securities fraud actions and their

replacement with the bright-line ban advocated by Appellees. The problem of conflict between our laws and those of a foreign government is much less of a concern when the issue is the enforcement of the anti-fraud sections of the securities laws than with such provisions as those requiring registration of persons or securities. The reason is that while registration requirements may widely vary, anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged. As Judge Friendly pointed out in *IIT, Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 921 (2d Cir.1980), "[t]he primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than [a foreign state's], that country will surely not be offended by their application."

Furthermore, declining jurisdiction over all "foreign-cubed" securities fraud actions would conflict with the goal of preventing the export of fraud from America. As the argument goes, the United States should not be seen as a safe haven for securities cheaters; those who operate from American soil should not be given greater protection from American securities laws because they carry a foreign passport or victimize foreign shareholders. A much stronger case would exist, for example, for the exercise of subject matter jurisdiction in a case where the American subsidiary of a foreign corporation issued fraudulent statements or pronouncements from the United States impacting the value of securities trading on foreign exchanges.

Moreover, we are leery of rigid bright-line rules because we cannot anticipate all the circumstances in which the ingenuity of those inclined to violate the securities laws should result in their being subject to American jurisdiction. That being said, we are an American court, not the world's court, and we cannot and should not expend our resources resolving cases that do not affect Americans or involve fraud emanating from America. In our view, the "conduct test" balances these competing concerns adequately and we decline to place any special limits beyond the "conduct test" on "foreign-cubed" securities fraud actions.

The issue for us to resolve here boils down to what conduct comprises the heart of the alleged fraud. Appellants assert that the alleged manipulation of the MSR by HomeSide in Florida made up the main part of the fraud since those false numbers constituted the misleading information passed on to investors through NAB's public statements. According to Appellants, if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5. Appellants insist that NAB's creation and dissemination of the public statements in question consisted solely of the mechanical insertion of HomeSide's numbers into the statements and public filings and that the locus of the improper conduct (Florida) and not the place of compilation (Australia) should determine jurisdiction.

The Appellees, on the other hand, argue that the allegedly false and misleading public statements made by NAB constituted the fraud, since, without those statements, no misinformation would have been reported, no investors would have been defrauded, and no actionable claims would have existed under Rule 10b-5. Since NAB's public statements were compiled in Australia and disseminated from there, Appellees contend that the only conduct that directly caused harm to investors occurred in Australia.

We conclude that we do not have subject matter jurisdiction. The actions taken and the actions not taken by NAB in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida. HomeSide, as a wholly owned, primarily operational subsidiary of NAB, reported to NAB in Australia. HomeSide's mandate was to run its business well and make money. The responsibilities of NAB's Australian corporate headquarters, on the other hand, included overseeing operations, including those of the subsidiaries, and reporting to shareholders and the financial community. NAB, not HomeSide, is the publicly traded company, and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world.

Appendix A

Appellants' claims arise under Rule 10b-5(b),[7] which focuses on the accuracy of *statements* to the public and to potential investors. Ensuring the accuracy of such statements is much more central to the responsibilities of NAC's corporate headquarters, which issued the statements, than to those of HomeSide, which did not. Liability under Rule 10b-5(b) requires a false or misleading statement. "Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b)." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir.1998) (citation and internal quotation marks omitted). NAB's executives possess the responsibility to present accurate information to the investing public and to the holders of its ordinary shares in accordance with a host of accounting, legal and regulatory standards. When a statement or public filing fails to meet these standards, the responsibility, as a practical matter, lies in Australia, not Florida.

Another significant factor at play here is the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets. Appellants press their appeal solely on behalf of foreign plaintiffs who purchased on foreign exchanges and do not pursue the "effects" test. They do not contend that what Appellants allegedly did had any meaningful effect

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7. Appellants also press 10b-5(a) and (c) "scheme liability" claims. Having failed to address these claims below, however, Appellants have waived them for purposes of this appeal. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 124 n. 29 (2d Cir.2005).

on America's investors or its capital markets. This factor weighs against our exercise of subject matter jurisdiction.

A third factor that weighs against jurisdiction is the lengthy chain of causation between the American contribution to the misstatements and the harm to investors. HomeSide sent allegedly falsified numbers to Australia. Appellants do not contend that HomeSide sent any falsified numbers directly to investors. If NAB's corporate headquarters had monitored the accuracy of HomeSide's numbers before transmitting them to investors, the inflated numbers would have been corrected, presumably without investors having been aware of the irregularities, much less suffering harm as a result. In other words, while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors. While HomeSide's rigging of the numbers may have contributed to the misinformation, a number of significant events needed to occur before this misinformation caused losses to investors. This lengthy chain of causation between what HomeSide did and the harm to investors weighs against our exercising subject matter jurisdiction. As the Supreme Court noted in *Stoneridge*, "deceptive acts [that] were not communicated to the public" do not suffice to "show reliance . . . except in an indirect chain that we find too remote for liability." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S.Ct. 761, 769, 169 L.Ed.2d 627 (2008); *accord Pugh v. Tribune Co.*, 521 F.3d 686, 696-97 (7th Cir.2008).

This particular mix of factors—the fact that the fraudulent statements at issue emanated from NAB's corporate headquarters in Australia, the complete lack of any effect on America or Americans, and the lengthy chain of causation between HomeSide's actions and the statements that reached investors—add up to a determination that we lack subject matter jurisdiction.

III. CONCLUSION

For all these reasons, the judgment of the district court is affirmed.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 25, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 6537(BSJ)

In re NATIONAL AUSTRALIA BANK SECURITIES LITIGATION

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

INTRODUCTION

The Consolidated Class Action Complaint (the "Complaint") in this action was filed by Russell Leslie Owen ("Owen"), Brian and Geraldine Silverlock (collectively, the "Lead Foreign Plaintiffs"), and Robert Morrison (the "Lead Domestic Plaintiff"), on their own behalf and on behalf of all others similarly situated (collectively, the "Plaintiffs"). Defendants National Australia Bank Limited ("NAB" or "Bank") and Frank Cicutto, Hugh Harris, Kevin Race, W. Blake Wilson, and Washington Mutual Bank, F.A., as successor in interest to HomeSide Lending, Inc. ("HomeSide"), move to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1), and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Appendix B

The Complaint alleges that the Defendants violated section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5. As explained further below, the Complaint alleges that the Defendants made false and misleading statements concerning HomeSide's operations and its contributions to NAB's financial health in filings with the Securities and Exchange Commission ("SEC"), foreign securities exchanges, the domestic and international press, and in corporate documents. The Complaint further alleges that the fraudulent and misleading statements were intended to, and did, artificially inflate the prices of NAB's securities and eventually caused losses to Plaintiffs, who are investors in NAB securities. The Complaint also alleges that certain of NAB's and HomeSide's officers, in their capacities as controlling persons, violated section 20(a) of the Exchange Act.

For the reasons explained below, the Complaint is DISMISSED, with leave to file an amended complaint with respect to domestic plaintiffs only.

Appendix B

BACKGROUND

Defendant NAB is Australia's largest bank, organized under the laws of Australia and headquartered there.[1] "Ordinary shares"[2] of NAB's stock trade on Australian and other foreign exchanges, but not on any United States exchange. Only certain instruments called American Depositary Receipts ("ADRs"),[3] which represent quantities of NAB ordinary shares, are traded on the New York Stock Exchange ("NYSE").

NAB acquired HomeSide in 1998 as part of NAB's efforts to expand its international presence. HomeSide

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1. Defendant Cicutto was at all relevant times NAB's managing director and chief executive officer.

2. "Ordinary shares" are the equivalent in Australia of "common stock" in the United States.

3. "An ADR is a receipt that is issued by a depositary bank that represents a specified amount of a foreign security that has been deposited with a foreign branch or agent of the depositary, known as the custodian. The holder of an ADR is not the title owner of the underlying shares; the title owner of those shares is either the depositary, the custodian, or their agent. ADRs are tradable in the same manner as any other registered American security, may be listed on any of the major exchanges in the United States or traded over the counter, and are subject to the [federal securities laws.] This makes trading an ADR simpler and more secure for American investors than trading in the underlying security in the foreign market." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir.2002) (citations omitted).

was then a mortgage service provider located in Jacksonville, Florida.[4] Its principal source of income was the fees that it generated for servicing mortgages. The present value of those fees was calculated using an internal valuation model, and was booked by NAB on its balance sheet as an asset called Mortgage Servicing Rights ("MSR"). HomeSide itself had no publicly traded securities during the relevant period.

During the proposed class period, the NAB defendants allegedly made various statements in SEC filings, the Bank's annual reports and in other contexts, asserting HomeSide's profitability and its contribution to NAB's overall profitability. The HomeSide defendants also allegedly made various false public statements relating to HomeSide's prospects and economic health. A number of these statements are detailed in the Complaint.

In July 2001, NAB announced that it would book a charge of $450 million because of a fiscal year writedown of the value of HomeSide's MSR (the "July Writedown"). As a consequence of the July Writedown, NAB's ordinary shares and its ADRs each fell by more than 5% on their respective markets. Then, in September 2001, NAB announced it would incur a further $1.75 billion writedown (the "September Writedown"), having

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4. NAB purchased HomeSide in 1998, then sold it to Washington Mutual Bank in December 2001. Defendants Harris, Race and Wilson were HomeSide's chief executive officer, chief operating officer, and chief financial officer, respectively, during the relevant period.

determined that the carrying value of HomeSide's MSR exceeded its fair value. $1.16 billion of the September Writedown was attributed to a combination of incorrect rate assumptions in HomeSide's MSR valuation model and changed assumptions in that modeling; the remaining $590 million was attributed to a writedown of good-will relating to HomeSide. In response to the September Writedown, NAB's ordinary shares fell by nearly 13% on the Australian market, and its ADRs fell by slightly more than 11.5% on the NYSE.

It is from these price drops that Plaintiffs claim a loss. The Lead Foreign Plaintiffs are residents of Australia, who purchased NAB's ordinary shares on an Australian exchange in 2001. The Lead Domestic Plaintiff is a United States resident who purchased the Bank's ADRs on the NYSE.

The Complaint alleges a fraudulent scheme, in that: (1) HomeSide, at the direction of the HomeSide officers, and at least with the knowing acquiescence of the NAB defendants, knowingly used unrealistic financial models in order to artificially inflate its MSR values;[5] (2) the

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5. The Complaint sets out in some detail HomeSide's use, during several months of 2000, of certain financial assumptions in its MSR valuation models. These models diverged, in some instances rather sharply, from the assumptions published by Bloomberg Media Interactive, which are described in the Complaint as "an accepted industry standard." The Complaint alleges that it was HomeSide's knowing use of these non-standard assumptions that allowed it, and NAB to show unwarranted profitability.

Defendants' various statements as to HomeSide's profitability and its contribution to NAB's profitability were consequently false and intentionally misleading; and (3) the alleged fraud, when revealed, caused losses for the owners of NAB's securities.

DISCUSSION

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE LEAD FOREIGN PLAINTIFFS' CLAIMS

Defendants move to dismiss the Lead Foreign Plaintiffs from the Complaint for lack of subject matter jurisdiction, under Fed.R.Civ.P. 12(b)(1), on the ground that the transactions of which these plaintiffs complain is fundamentally foreign in nature, and thus beyond the scope of this Court's jurisdiction under the Exchange Act.[6]

A. Standard for Rule 12(b)(1) Dismissal

A plaintiff bears the burden of proving by a preponderance of the evidence that subject matter

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6. Defendants do not advance the same jurisdictional defense against the Lead Domestic Plaintiff, who purports to represent a class of investors who purchased the Bank's ADRs during the proposed class period. There is no dispute that the securities law extends to protect domestic investors who purchase securities in domestic markets. *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993, 997 (2d Cir.1975). However, as explained in Point II, *supra*, the Lead Domestic Plaintiff is dismissed from the action on other grounds.

jurisdiction exists. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, (1936); *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir.2002). Jurisdictional allegations must be shown affirmatively, and may not be inferred favorably to the party asserting it. *See Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998). In resolving a factual challenge to subject matter jurisdiction, this court may consider evidence outside of the pleadings. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000); *see also Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986).

B. Subject Matter Jurisdiction Under the Exchange Act

The Exchange Act itself is silent as to its extraterritorial reach. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir.1995); *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 940 F.Supp. 528, 533 (S.D.N.Y.1996), *aff'd*, 147 F.3d 118 (2d Cir.1998). Consequently, "[w]hen, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.1975); *see also In re Alstom S.A. Secur. Litig.*, 406 F.Supp.2d 346, 375 (S.D.N.Y.2005) ("[I]nsofar as the Second Circuit's subject matter jurisdiction doctrine viewed as a whole

suggests an overlying principle . . . it is one that, in the final analysis, is grounded on congressional policy as bounded by a standard of reasonableness."). The presumption in such a case is against extending jurisdiction. *Cf. Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C.Cir.1987); *Europe & Overseas Commodity Traders*, 147 F.3d at 131.

Guided by these principles, the Second Circuit developed two tests for determining whether district courts have subject matter jurisdiction over foreign plaintiffs alleging violations of the Exchange Act's anti-fraud provisions: the "effects" test and the "conduct" test. *See Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336-37 (2d Cir.1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-09, *modified en banc on other grounds*, 405 F.2d 215 (2d Cir.1968).

Under the effects test, a district court may exercise jurisdiction over foreign plaintiffs where the alleged illegal activity causes a "substantial effect" on United States investors or markets. *See Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.1991) (citations omitted). Because the effects in the United States must be substantial to confer jurisdiction under this test, it is not satisfied when predominantly foreign-based fraud only tangentially impacts the United States market, such as by affecting general investor confidence. *See, e.g., Bersch*, 519 F.2d at 987-88.

Appendix B

Under the conduct test, a district court may exercise jurisdiction if a defendant's conduct in the United States was more than "merely preparatory" to the fraud, and particular acts or culpable failures to act within the United States "directly caused" losses to foreign investors abroad. *See Bersch*, 519 F.2d at 993; *accord Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir.1983); *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir.2003).

While articulation of the conduct test is easy, its application is not. Aside from the pertinent residence of the parties, the courts in this circuit generally look to the "the material elements of the conduct alleged to comprise the fraud at issue," subdivided by the venue and the extent to which particular acts occurred in the United States versus abroad. *See Alstom*, 406 F.Supp.2d at 371 (citations omitted). This analytical undertaking is complicated by the commercial realities that imbue modern international securities transactions. *See id.* at 372.

> [T]he conduct constituting the charged fraud causing the asserted financial losses is rarely a single act readily traceable in its entirety to a discrete time and place. Rather, more commonly, the alleged misdeeds may comprise but one aspect of a scheme on a larger scale, a link in a transactional chain forming a continuum that spreads out to multiple jurisdictions. Identifying where the charged fraud starts and where it culminates, and what comprises the numerous material points

> and participants in the transactions in between, inevitably presents formidable challenges.

Id. The complexity of the required analysis means that individual cases are decided on very fine distinctions. *See id.* at 374 ("[T]he presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive in future cases." (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir.1980))). In general, however, "a case in which the alleged fraud was committed by foreign defendants on foreign individuals in a foreign country" is not what the securities laws of this country were designed to remedy. *See Tri Star Farms Ltd. v. Marconi*, PLC, 225 F.Supp.2d 567, 578 (W.D.Pa.2002).

The Second Circuit has instructed that the effects and conduct tests may be considered collectively in determining jurisdiction. *See Itoba*, 54 F.3d at 22 ("[A]n admixture or combination of the two [tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."). However, where the effects of an alleged fraud are predominantly foreign, the amount of domestic conduct and its nexus to the alleged injury required to sustain jurisdiction is at its greatest. *See generally Bersch*, 519 F.2d at 987-88. That is especially true in a class action involving both foreign and domestic plaintiffs, such as this, where the danger exists that a "very small tail" may be "wagging an

elephant." *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018, n. 31 (2d Cir.1975); *accord Bersch*, 519 F.2d at 996 (2d Cir.1975) (noting that "[t]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts," especially "when they are abroad.").

C. The Foreign Plaintiffs Have Failed to Demonstrate Subject Matter Jurisdiction Over their Claims

Weighing the totality of the factors here, the Court finds that the Lead Foreign Plaintiffs have failed to meet their burden of demonstrating that subject matter jurisdiction exists.

To begin, the alleged fraud had very little—if any—demonstrable effect on the United States market. The Lead Foreign Plaintiffs do not appear to contend otherwise. At most, the alleged fraud *may* have adversely impacted domestic ADR purchasers. As explained *infra* in Point II, however, the Lead Domestic Plaintiff who represents the proposed ADR subclass has not even demonstrated any damage during the relevant period. Moreover, because the aggregate value of the ADRs represented a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares, any effect on the United States market from the alleged fraud pales in comparison to the effect on the foreign markets.

Nor is the alleged domestic conduct sufficient to confer this Court with jurisdiction. The domestic

conduct upon which the Plaintiffs rely consists of HomeSide's allegedly improper valuation of its future cash flow by using and/or manipulating a valuation model for its MDRs that HomeSide allegedly knew yielded unrealistic results. Plaintiffs contend that this conduct provides a basis for subject matter jurisdiction on the theory that the statements made by NAB in Australia and relied upon by NAB investors simply would not have been fraudulent but—for HomeSide's alleged impropriety.

Defendants maintain, however, that HomeSide's alleged misconduct (even if true) is insufficient to confer jurisdiction in that it did not "directly cause" the Lead Foreign Plaintiffs' alleged loss. Rather, Defendants claim, the alleged securities fraud was committed—if at all—only when NAB distributed the allegedly false information to the Lead Foreign Plaintiffs abroad. In support of their position, Defendants heavily rely on the Second Circuit's seminal and oft-cited "conduct test" decision in *Bersch*, 519 F .2d 974 (2d Cir.1975).

In *Bersch*, a Canadian company made a series of public offerings of its common stock to investors outside of the United States. *Bersch*, 519 F.2d at 979-80. The shares were purchased mostly by foreigners and traded on foreign exchanges, although some of the shares ended up in the hands of Americans. *Id.* Shortly after the offerings, the price of the shares plummeted. *Id.* at 981. The domestic plaintiff brought a proposed class

action on behalf of all domestic and foreign purchasers of the Canadian company's stock. *Id.* In his complaint, he alleged that the offering materials failed to disclose material facts, and that a variety of conduct occurred in the United States. *Id.* Specifically, he claimed that the underwriters and their agents had met in New York on a number of occasions to plan the offering; that an American law firm and American accounting firm helped prepare the offering; that parts of the allegedly false prospectus were drafted and reviewed in New York; and that bank accounts were opened in New York in anticipation of deposits from the offering. *Id.* at 985, n. 24.

In reversing the district court, the Second Circuit in *Bersch* held that no subject matter jurisdiction existed as to the foreign purchasers because the alleged domestic conduct was merely preparatory and did not "directly cause [ ]" the alleged loss. *Id.* at 987. The Court explained:

> The fraud, if there was one, *was committed by placing the allegedly false and misleading prospectus in the purchasers' hands.* Here the final prospectus emanated from a foreign source. . . . Not only do we not have the case where all the misrepresentations were communicated in the nation whose law is sought to be applied . . . or the case where a substantial part of them were . . . but we do

> not even have the oft-cited case of the shooting of a bullet across a state line where the state of the shooting as well as of the state of the hitting may have an interest in imposing its law. At most the acts in the United States helped to make the gun whence the bullet was fired from places abroad. . . .

Id. at 987 (emphasis added).

As applied to the facts of this case, Defendants claim that *Bersch* is controlling. Specifically, they argue that notwithstanding the alleged domestic conduct by HomeSide, the allegedly fraudulent statements were "fired" from Australia at predominantly foreign plaintiffs who purchased NAB stock on that country's stock exchange.

The Lead Foreign Plaintiffs attempt to distinguish *Bersch* on the ground that the alleged domestic conduct in that case was more far removed from the ultimate commission of the fraud than is the case here. Plaintiffs also point out that *Bersch* was not the last, or only, word on the issue. For example, in *Vencap*—decided the same day as *Bersch*—the Second Circuit explained that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *Vencap*, 519 F.2d at 1017. Moreover, in *Itoba*, the Second Circuit explained that the "situs of preparations for SEC filings should not be

determinative of jurisdictional questions." 54 F.3d at 124.[7]

The Second Circuit applied these principles in *SEC v. Berger*, upon which Plaintiffs heavily rely. There, the defendant was a New York resident who had formed an offshore investment company (the "Fund") organized under the laws of the British Virgin Islands. *Berger*, 322 F.3d at 188. The Fund "invested . . . in stocks on domestic securities exchanges" largely through a brokerage account at Bear Stearns in New York that "cleared all of its transactions" in New York City. *Id.* Ultimately, the Fund suffered significant financial losses as a result of investments which were made at the defendant's direction. *Id.* at 189. Rather than report the losses to investors, however, the defendant admittedly created fraudulent account summaries in New York to mask the shortfalls. *Id.* These summaries were used in two fraudulent ways: first, they were incorporated into "the

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7. As the court in *Alstom* explained:

> [T]he Second Circuit has instructed that whether the alleged misrepresentations were actually made in the United States, or in another country, or whether a material domestic act directly caused the alleged harm, is not in and of itself determinative. Nor is the site of the preparation of registration statements filed in this country by itself a sufficient jurisdictional consideration. . . . In fact, the Circuit Court has cautioned against mechanical reliance on any particular factor as a sufficient decisional guide from one case to another.

406 F.Supp.2d at 374-75 (citations omitted).

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Fund's annual financial statements, which were created . . . in New York and made available for potential investors to review; and second, "the fictitious financial statements" prepared in New York were "sent offshore to the Fund's administrators, and then calculations based on these statements were retransmitted back into this country and abroad" to prospective and then-existing shareholders. *Id.* at 189; *see also id.* at 194. The Second Circuit held that subject matter jurisdiction existed on these facts, explaining that "while operating entirely from New York, [the defendant] executed a massive fraud upon hundreds of investors involving transactions on United States exchanges." *Id.* at 195. According to the Court, the fact that the statements that ultimately conveyed the fraudulent information to investors were prepared and mailed in Bermuda" was immaterial. *Id.* That was so because the preparation and mailing "was not itself fraudulent," as "[t]he Fund [a]dministrator was simply acting under [the defendant's] instruction," who himself had concocted the scheme in New York. *Id.*

The instant case can fairly be said to fall somewhere in between *Bersch* (upon which Defendants rely) and *Berger* (upon which Plaintiffs rely). While the amount and significance of the alleged domestic conduct is greater in this case than in *Bersch*, it falls far short of the alleged conduct in *Berger*. Unlike in *Berger*—and more like *Bersch*—the securities at issue here are predominantly foreign securities traded on foreign exchanges. And whereas in *Berger* "the fraudulent conduct was carried out *entirely*" in the United States,

322 F.3d at 195 (emphasis added), a significant, if not predominant, amount of the material conduct in this case occurred a half-world away.

That the allegedly false statements pertained to NAB's domestically based subsidiary does not change the result. In this regard, the Court finds instructive Judge Owen's decision in *Froese v. Staff*, which involved similar allegations as those presented here. *See Froese*, No. 02 CV 5744(RO), 2003 WL 21523979 (S.D.N.Y. July 7, 2003). The plaintiffs in *Froese* were investors in a German clothing company, who incurred losses due to artificially inflated earnings statements the corporate defendant prepared and disseminated from Germany. *Id.*, at * 1. Those statements had been inflated because the defendant's U.S. subsidiary had allegedly engaged in "channel stuffing," a practice whereby "revenues [are] overstated by including amounts for products that the company delivered to and endeavored to force their retail network to accept despite no demand, with perhaps secret assurances that the goods, if unsold, could be returned." *Id.* Notwithstanding that the allegedly inflated financial information emanated from the United States, Judge Owen found that jurisdiction was absent because the allegedly fraudulent statements were "conceived, engineered and published in Germany," and that it was "these misstatements and not any activity which [led] to the alleged misrepresentations which 'directly caused' the financial losses." *Id.*, at *2.

Also instructive is Judge Pauley's decision in *In re Bayer AG Secur. Litig.*, 423 F.Supp.2d 105

(S.D.N.Y.2005). There, the putative class action plaintiffs were investors in the securities of German-based Bayer AG, which sold its securities primarily in foreign markets and, to a lesser extent, in the form of ADRs in the United States. *See id.* at 107. The plaintiffs attempted to premise jurisdiction over a subclass of foreign plaintiffs by alleging that Bayer AG's wholly owned United States subsidiary made fraudulently aggressive projections about the profitability of a particular pharmaceutical, which projections formed the basis of misleading statements made by Bayer AG and were relied upon by the foreign plaintiffs abroad. *Id.* at 109, 111. In declining to extend jurisdiction to the foreign plaintiffs, the court gave significant weight to the "location from where [the] allegedly false statements emanated"—which was Germany—as such dissemination "embodie[d] the heart of the alleged fraud." *Id.* at 111 (internal quotes, marks and citations omitted).[8]

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8. This Court is mindful of decisions by other judges in this district which reached contrary results to *Froese* and *Bayer* in arguably similar cases. For example, in *Alstom*, Judge Marrero found that jurisdiction existed over a class of foreign plaintiffs, who alleged that: (i) "accounting improprieties" at a United States subsidiary led to significant errors in its financial statements; and (ii) that such statements were incorporated into the financial statements of the foreign parent, which were distributed and relied upon by investors abroad. *Alstom*, 406 F.Supp.2d at 362-63, 387. And in *In re Gaming Lottery Secur. Litig.*, Judge Patterson found that jurisdiction existed over a class of foreign plaintiffs who alleged that: (i) the Canadian based Gaming Lottery Corporation ("GLC") had acquired a United States subsidiary, Specialty Manufacturing Inc. ("SM"),

(Cont'd)

Appendix B

While the instant case presents a close call, the Court is ultimately left with the impression that the Lead Foreign Plaintiffs have not met their burden of demonstrating that Congress intended to extend the reach of its laws to the predominantly foreign securities transactions at issue here. As was the case in *Bersch*, *Froese* and *Bayer*, "[a]t most the acts in the United States helped to make the gun whence the bullet was fired" from-and at-places abroad. *See Bersch*, 519 F.2d at 987.

HomeSide's alleged conduct—however it may be classified—is not in itself *securities* fraud. It amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad. Thus, while Plaintiffs urge that there would have been no securities fraud but-for the domestic conduct, they fail to appreciate that the domestic conduct would be immaterial to its Rule 10b-5 claim but-for (i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to

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(Cont'd)

without obtaining state regulatory approval; (ii) falsely represented to the investing public that this acquisition was completed when it had not been; (iii) consolidated SM's financial results with those of GLC; and (iv) misled the plaintiffs by making announcements of other United States acquisitions that were certain to fail once those state regulators learned of GLC's deception concerning SM. *See* 58 F.Supp.2d 62, 65 (S.D.N.Y.1999). Regardless of the jurisdictional decisions in *Alstom* and *Gaming Lottery*, I believe that the allegations before me in this case warrant a different result.

investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad.[9]

On balance, it is the foreign acts—not any domestic ones—that 'directly caused' the alleged harm here. *See Bersch*, 519 F.2d at 993; *see also Froese*, 2003 WL 21523979, at * 2; *Bayer*, 423 F.Supp.2d at 111-12. Accordingly, the Lead Foreign Plaintiffs are dismissed from the action because this Court lacks subject matter jurisdiction over their claims. *See Bersch*, 519 F.2d at 997 ("eliminat[ing] from the class action all purchasers other than [those] who were residents or citizens of the United States.").

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9. While NAB filed certain forms with the SEC that incorporated the allegedly fraudulent representations disseminated in comparable filings abroad, that cannot provide a basis for jurisdiction as to the Lead Foreign Plaintiffs, who do not allege that they were even aware of the SEC filings, much less relied upon them. *See, e.g., In re Baan Co. Secur. Litig.*, 103 F.Supp.2d 1, 10 (D.D.C.2000) ("To establish jurisdiction, [foreign] plaintiffs must allege that the filings with the SEC or other fraudulent actions in the United States were "a substantial or significant contributing cause of the decision to purchase stock") (internal marks and citations omitted); *Tri-Star Farms*, 225 F.Supp.2d at 579 n. 13 (stating that "the inclusion of alleged misrepresentations in reports filed with the SEC . . . are insubstantial in comparison to the conduct that allegedly occurred abroad and that this conduct could not have played a significant role in any losses sustained by the foreign investors."); *accord Bayer*, 423 F.Supp.2d at 112; *Nathan Gordon Trust v. Northgate*, 148 F.R.D. 105, 108 (S.D.N.Y.1993).

II. THE LEAD DOMESTIC PLAINTIFF LACKS STANDING AND HAS OTHERWISE FAILED TO STATE A CLAIM FOR RELIEF

The Defendants separately move to dismiss from the action the sole Lead Domestic Plaintiff—Mr. Morrison—who is the only named plaintiff purporting to assert damages on behalf of similarly situated purchasers of the Bank's ADRs on the NYSE. Defendants maintain that Mr. Morrison lacks standing, and has otherwise failed to state a claim, because he has failed to allege that he suffered any damages from the alleged fraud. The Court agrees.

Pecuniary loss is an essential element of a Rule 10b-5 claim for money damages. *See Commercial Union Assur. Co. v. Milken*, 17 F.3d 608, 613 (2d Cir.1994). The measure of damages in private securities fraud actions are subject to the Private Securities Litigation Reform Act ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995) (codified in pertinent part at 15 U.S.C. § 78u-4(e)(1)). As relevant, section 78u-4(e)(1) provides that where a plaintiff purchases a security during a putative class period, his recovery is limited to the amount by which his purchase price exceeds the security's mean price during the 90-day period immediately following the correcting disclosure (the so-called "lookback period"). 15 U .S.C 78u-4(e)(1).[10]

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10. Subject to an exception not pertinent here, 15 U.S.C. § 78u-4(e)(1) provides in relevant part:

> [I]n any private action arising under this chapter in which the plaintiff seeks to establish damages by

(Cont'd)

By operation of this provision, "if the mean trading price of a security during the 90-day period following the correction is *greater* than the price at which the plaintiff purchased his stock then that plaintiff would recover nothing under the PSLRA's limitation on damages." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir.2000) (emphasis in original). That is the case here.

The Lead Domestic Plaintiff states in his PSLRA certification that his only purchase of NAB's securities during the proposed class period was a purchase of 125 ADRs on August 11, 2000, at a price of $74 per security. The mean trading price during the statutory lookback period was $75-one dollar more than what he originally paid for the securities. (*See* Declaration of George T. Conway III, Ex. W.)[11] Because the Lead Domestic

(Cont'd)

> reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.

15 U.S.C. § 78u-4(e)(1). This provision was in large part enacted to prevent putative plaintiffs from seizing upon short-term price swings in the market.

11. This Court is authorized to take judicial notice of publicly reported stock prices. *E.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 272 F.Supp.2d 243, 245 n. 9 (S.D.N.Y.2003).

Plaintiff has failed to allege that he was damaged in any way by the alleged fraud, he lacks standing in this action and has otherwise failed to state a claim for relief.

CONCLUSION

For the reasons explained in Parts I and II, *supra*, no named plaintiff remains in this action. Accordingly, the Complaint is DISMISSED. Plaintiffs' counsel, however, is granted leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only.

SO ORDERED.

s/ Barbara S. Jones
Barbara S. Jones
UNITED STATES DISTRICT JUDGE

New York, New York
October 25, 2006

APPENDIX C — BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION AS *AMICUS CURIAE* IN RESPONSE TO THE COURT'S REQUEST OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

07-0583-cv

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK, and GERALDINE SILVERLOCK.

Plaintiffs-Appellants,

MARIA KENNEDY, HARVARD B. KOLM, and NORMAN HAUGE,

Plaintiffs,

-v-

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE, and W. BLAKE WILSON,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION *AS AMICUS CURIAE*, IN RESPONSE TO THE COURT'S REQUEST

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INTRODUCTION

The Securities and Exchange Commission submits this brief *amicus curiae* in response to the Court's invitation to offer "the views of the [Commission] on both the broader questions posed by this case and the case itself" as to whether antifraud provisions of the United States securities laws apply to the alleged transnational fraud. This case involves foreign purchasers who bought a foreign issuer's securities on a foreign exchange, but where significant aspects of the fraudulent conduct occurred in the United States.

The Commission believes that this Court should expressly set forth the following standard to assess whether the antifraud provisions apply to transnational securities-fraud cases:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

That formulation is reflective of the Second Circuit's present approach and it provides an overall conceptual framework to guide lower courts as these confront jurisdictional issues in future transnational securities fraud cases.

This Court's case law can be read to set forth a series of "diverse formulations" of the applicable legal standard. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 373-74 (S.D.N.Y. 2005). For example, in the view of one district court, there has been an "apparent shift in emphasis from a test of strict causation" — one where the domestic conduct must be the immediate cause of the overseas investors' losses "to one of materiality of the domestic acts." *Id.* This has created a "tension" in the case law, *id.*, and, as a result, district courts have largely resorted to engaging in a case-by-case comparison of the specific fact patterns to those of existing Circuit precedent. As the district court here explained, "[t]he complexity of th[is] required analysis means that individual cases are decided on very fine distinctions." (SPA-9 (2006 WL 3844465) ("This analytical undertaking is complicated by the commercial realities that imbue modern international securities transactions.")).

The Commission believes that this Court could bring greater clarity to this area by adopting the proposed formulation. Furthermore, because this jurisdictional test would also be applied to Commission actions, *see SEC v. Berger*, 322 F.3d 187, 193-94 (2d Cir. 2003), we believe that the proposed standard would help preserve the Commission's ability to bring an enforcement action involving future transnational frauds such as the one alleged in this case.

Finally, the Commission believes that, applying that standard to the allegations in plaintiffs' complaint,

material and substantial conduct in furtherance of the alleged fraud occurred in the United States so as to support application of the antifraud provisions (at least with respect to enforcement actions brought by the Commission or private actions brought by named foreign plaintiffs).[1]

STATEMENT OF THE ISSUES ADDRESSED

1. Do the antifraud provisions of the securities laws extend to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial part of the alleged fraud?

2. Do the plaintiffs' allegations satisfy this standard?

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1. This Court has suggested on several occasions, based on additional policy considerations unique to class actions, that a more jurisdictionally restrictive standard may be warranted in the class-action context. *See ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975); *see, e.g., SEC v. Berger*, 322 F.3d 187, 195 (2d Cir. 2003); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975). The Commission does not take a position on what, if any, additional showing should be required for class actions. In this brief, therefore, we are only discussing the application of the conduct test as it would apply to Commission enforcement actions and private suits by named foreign plaintiffs.

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BACKGROUND

A. General Background as to the Transnational Reach of the Antifraud Provisions of the Securities Laws.

1. Cases Involving Transnational Securities Frauds Are Becoming More Prevalent and Raise Difficult Questions Concerning the Application of the Antifraud Provisions of the Securities Laws.

This appeal involves the question of whether Congress, in the exercise of its legislative or prescriptive jurisdiction, intended the antifraud provisions of the securities laws to apply to securities frauds that take place in part in the United States and in part overseas, but that principally or exclusively result in losses to overseas investors. These types of suits have become more prevalent in recent years. *See, e.g.*, *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 334 (D.N.J. 2005); *In re Bayer AG Sec. Litig.*, 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004); *Froese v. Staff*, 2003 WL 21523979 (S.D.N.Y. July 7, 2003); *In re Gaming Lottery Sec. Litig.*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999).

To apply our securities laws to these transnational securities frauds necessarily involves some extraterritorial application of United States laws because, by definition, not all of the fraudulent conduct occurs in the United States, nor are all the wrongdoers

or victims necessarily in the United States. *See, e.g., In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 380 (S.D.N.Y. 2005) (describing transnational securities frauds). The issue becomes, therefore, how and where to draw the line with respect to application of the antifraud provisions of the United States securities laws.

> Complicating this inquiry are the commercial realities associated with modern international securities trading. Often these transactions involve multiple components, participants and events centered in several countries. The executives and directors of the company answerable for the wrongdoing may be headquartered in one country.
>
> The false representations may be contained in securities disclosure statements registered or in public announcements published in various other nations. The lawyers, accountants and underwriters who prepared the prospectuses and related documents may have coordinated their drafting activities and structuring of the transaction in yet a different jurisdiction. The marketing of the investments may take place in exchanges around the world. Hence, the conduct constituting the charged fraud causing the asserted financial losses is rarely a single act readily traceable in its entirety to a discrete time and place. Rather, more commonly, the alleged misdeeds may comprise but one

> aspect of a scheme on a larger scale, a link in a transactional chain forming a continuum that spreads out to multiple jurisdictions. Identifying where the charged fraud starts and where it culminates, and what comprises the numerous material points and participants in the transactions in between, inevitably presents formidable challenges.

Id. at 372 (footnote omitted).

2. Courts Have Developed a Conduct Test and an Effects Test for Resolving Questions of the Transnational Application of the Antifraud Provisions.

The text of the securities laws is silent as to the transnational reach of these laws. *See Itoba Ltd v. LEP Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995). In 1934, "Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States. The web of international connections in the securities markets was then not nearly as extensive or complex as it has become." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987). In the absence of clear Congressional guidance, the courts have attempted "[t]o discern 'whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to'" such transnational securities transactions. *Europe and*

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Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998). As courts have acknowledged, this inquiry has largely been guided by "policy considerations and the court's best judgment." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998).

Two tests have emerged to determine the reach of the antifraud provisions: the effects test and the conduct test. *See Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *Itoba Ltd.*, 54 F.3d at 121-22. Satisfaction of either test alone, or an "admixture or combination of the two," affords jurisdiction. *Itoba Ltd.*, 54 F.3d at 122. The effects test centers its inquiry on whether domestic investors or markets are affected as a result of actions occurring outside of the United States. *Banque Paribas*, 147 F.3d at 125. *See also Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983). By contrast, the conduct test focuses "on the nature of [the] conduct within the United States as it relates to carrying out the alleged fraudulent scheme," *Psimenos*, 722 F.2d at 1045, on the theory that "Congress would not want the United States to become a base for fraudulent activity harming foreign investors." *Banque Paribas*, 147 F.3d at 125. A related purpose underlying the conduct test is ensuring international reciprocity; by extending our securities laws to prohibit fraudulent conduct here that injures overseas investors, the United States can reasonably expect other countries' laws to offer comparable protection to prevent fraudulent conduct overseas that is directed towards our investors. *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975). *See also SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

3. Plaintiffs Rely Solely on the Conduct Test.

The parties agree that this case only implicates the conduct test. "The chronic difficulty with [that test] has been describing, in sufficiently precise terms, the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction." *Kauthar*, 149 F.3d at 665. "Indeed, the circuits that have confronted the matter have articulated a number of methodologies." *Id.*

The District of Columbia Circuit, for example, has advanced the most restrictive approach, requiring that the domestic conduct at issue must itself constitute a securities violation. *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) ("[J]urisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish [a violation of the antifraud provisions]."). The other courts of appeals that have considered the issue have, instead, required that the conduct in the United States needs to be a material to the overseas' investors losses, but have not required that all the elements of the violation occur in the United States.[2] *See, e.g.*,

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2. To the extent that any distinction can be discerned among the Circuits that require materiality, it has been asserted that the Third, Eighth, and Ninth Circuits require "some lesser quantum of conduct" than the Second, Fifth, and Seventh Circuits. *Kauthar*, 149 F.3d at 666. *See also Psimenos*, 722 F.2d at 1046 n.6. Recognizing that this Court is bound by prior precedent, in this brief we do not address the standards followed by other Courts of Appeals.

Kauthar, 149 F.3d at 666 (7th Cir.) (domestic conduct must be "material" and "substantial"); *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 905 & n.10 (5th Cir. 1997) (same); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983) (domestic conduct be "material" and "significant" to the furtherance of the scheme); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds. Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) (same); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983) (domestic conduct must be "material" and "substantial"); *SEC v. Kasser*, 548 F.2d 109, 114, 115 (3d Cir. 1977) ("some activity" in the United States that is "essential to the plan to defraud").[3]

As discussed below, the Second Circuit's decisions have developed the law on a case-by-case basis without explicitly articulating the generally applicable standard. As a result, there has been uncertainty in the district courts. *See. e.g.*, In *re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 372-76 (S.D.N.Y. 2005). For that reason, the Commission recommends that this Court adopt the standard that we propose.

[3] Notably, the District of Columbia Circuit in *Zoelsch* appeared to believe it was applying this Court's test. *Compare Zoelsch*, 824 F.2d at 31 ("The Second Circuit's rule seems to be that jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation [of the antifraud provisons]."), *with Kauthar*, 149 F.3d at 665 n.10 ("We share the reservations of the Fifth Circuit as to whether the District of Columbia Circuit accurately portrayed the Second Circuit's jurisprudence.").

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B. This Litigation

This is a class action on behalf of non-U.S. shareholders of National Australia Bank who purchased stock between April 1, 1999, and September 3, 2001.[4] The complaint alleges that the defendants violated section 10(b) of the Exchange Act and Rule 10b-5. As explained below, the complaint alleges that the defendants made false and misleading statements overseas to the class members concerning the operations of a United States subsidiary, but that the fraudulent scheme was hatched in the United States and the fraudulent data was generated here. The complaint further alleges that the false and misleading statements artificially inflated the prices of NAB's securities trading overseas and eventually caused losses to the class members.

1. The Allegations in the Complaint

Defendant NAB is organized under the laws of Australia and is headquartered in Melbourne, Australia, and its ordinary shares (the Australian equivalent of common stock) trade on the Australian securities exchanges. A very limited number of NAB's American

4. As originally styled, this class action included United States residents who purchased ADR interests (*see infra* note 5) in defendant NAB during the class period. In the same order in which jurisdiction was held lacking as to the foreign class members' claims, the district court dismissed the lead domestic plaintiff because he did not suffer a loss during the statutory look-back period.

Depository Receipts (representing less than 1.1% of NAB's ordinary shares) traded on the New York Stock Exchange, but none of the class members remaining in this suit are alleged to have purchased these instruments.[5]

At all relevant times, HomeSide Lending, Inc., located in Jacksonville, Florida, was a wholly-owned subsidiary of NAB. HomeSide was a mortgage service provider and its principal source of income was the fees that it generated for servicing mortgages.[6] The present value of those fees was calculated using an internal valuation model, and was booked by NAB on its balance sheet as an asset called Mortgage Servicing Rights.

The allegations of securities fraud in this suit stem from the calculation of HomeSide's MSR. In order to calculate the present value of the MSR, HomeSide employed valuation models and software systems that sought to account for the various economic forces that impact prepayment rates by factoring in projected future interest rates and other projected future economic conditions. The complaint alleges that between

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5. An ADR is a negotiable certificate issued by a United States depository bank that represents a specified number of shares of a foreign security that have been deposited with a foreign branch of the depository.

6. In addition to HomeSide, NAB owned other operations in the United States, including Michigan National Bank. NAB's United States operations accounted for not more than 13% of its assets at all times relevant to this suit.

1998 and 2001, HomeSide, under the direction of its three principal executive officers (defendants Hugh Harris, Kevin Race, and W. Blake Wilson), had been deliberately overvaluing HomeSide's MSR by modifying the various economic assumptions used to produce the MSR valuations, purportedly overestimating the present value of the MSR by hundreds of millions of dollars.

The complaint further alleges that this overvaluation scheme was hatched by the HomeSide defendants in the United States and that the fraudulent overvaluations were also generated in the United States and then transmitted to Australia for incorporation into NAB's financials. Although not initially a knowing party to the fraud, the NAB defendants (*i.e.*, NAB and its CEO, Frank Cicutto) are alleged to have learned in July 2000 that the HomeSide defendants were manipulating the MSR valuation model. Nonetheless, the NAB defendants proceeded to release this fraudulent information to investors in Australia through NAB's annual reports, as well as in press releases that asserted HomeSide's profitability and its contribution to NAB's overall profitability.[7]

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7. NAB also purportedly included the false information in filings with the Commission with respect to the ADRs. The parties agree that these filings do not form a part of the jurisdictional inquiry in this class action suit because none of the overseas class members relied on these filings. The HomeSide defendants are also alleged to have made several exaggerated statements in the United States, but here again, the parties appear to agree that these statements were not relied upon by the overseas class members, and thus these statements are not relevant to the jurisdictional inquiry.

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In July 2001, and then again in September 2001, NAB announced that it would book an approximately $2.1 billion writedown stemming from the overvaluation of HomeSide's MSR. Following the September writedown, NAB's ordinary shares fell by nearly 13% on the Australian market.

2. The District Court's Order Dismissing the Case

On October 25, 2006, the district court dismissed the claims of the foreign plaintiffs, holding that the antifraud provisions of the securities laws do not reach the foreign plaintiffs' claims.[8] The district court applied the conduct test to the allegations, comparing the conduct at issue here with the conduct at issue in two earlier Second Circuit decisions that reached opposite conclusions about jurisdiction: *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975), which rejected jurisdiction, and *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003), which upheld jurisdiction. The district court reasoned that, "[o]n balance, it is the foreign acts — not any domestic

8. It is assumed for purposes of resolving the subject matter jurisdiction issue that the complaint states a cause of action, but there is a dispute between the parties as to whether the conduct of the Florida subsidiary and the other American defendants amounts to only aiding and abetting the violation allegedly committed by the parent bank, in which case the subsidiary could be liable in an action brought by the Commission but not in one for damages brought by a private party. *See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). We do not address that issue.

acts — that 'directly caused' the alleged harm here," and thus held that jurisdiction is lacking with respect to the overseas class members' claims.

ANALYSIS

I. The Second Circuit's Case Law Relating to the Conduct Test Has Proven Difficult to Apply.

A review of a number of this Court's cases applying the conduct test reveals both the factors to which the court has looked, and the uncertainties of applying those factors to specific fact patterns. This Court itself has cautioned that "'the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive' in future cases." *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980).

Moreover, district courts in the Second Circuit have had difficultly understanding and applying the case law. *Compare Froese v. Staff*, 2003 WL 21523979 (S.D.N.Y. July 7, 2003) *with In re Gaming Lottery Secur. Litig.*, 58 F. Supp. 2d 62 (S.D.N.Y. 1999). One district court, after examining the case law beginning with *Bersch*, has asserted that this difficulty arises from an "apparent shift in emphasis from a test of strict causation to one of materiality of the domestic acts." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 373 (S.D.N.Y. 2005).

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A. Overview of the Relevant Second Circuit Case Law.

• ***Bersch*** *— jurisdiction should be exercised only when United States conduct "directly" causes investors' losses, not when the conduct is merely preparatory or is relatively small in comparison to the conduct abroad.*. *Bersch v. Drexel Firestone Inc.*, was a class action in which certain conduct in connection with offerings of securities of a foreign issuer took place in the United States, including such activities as meetings of various participants in the offering, drafting of parts of offering documents, and retention of and consultation with accountants. 519 F.2d 974, 985 n.24 (2d Cir. 1975) (Friendly, J.) (listing activities).[9] Nevertheless, the Court considered the transaction to be "predominantly foreign," 519 F.2d at 985, in that the issuer was foreign, all the offering documents were finalized overseas, and the offers and sales occurred there. 519 F.2d at 987. This. Court concluded that a United States court should not exercise jurisdiction over claims brought by foreign plaintiffs when the underwriting related to a foreign issuer clearly identified with a foreign country and the fraud was committed overseas. If there was fraud, this

9. Prior to this case, *Bersch* has been the only transnational securities-fraud class action involving foreign class members that this Court (or any court of appeals) has considered. Although the *Bersch* Court set forth the additional policy considerations that *might* come into play in an transnational securities-fraud class action, the court did not purport to apply any form of heightened standard in deciding the case. See *supra* note 1.

Court explained, it "was committed by placing the allegedly false and misleading prospectus in the purchasers' hands," and the "final prospectus emanated from a foreign source." *Id.* The *Bersch* Court saw no reason to extend United States jurisdiction to "cases where the United States activities are merely preparatory or take the form of culpable nonfeasance and are relatively small in comparison to those abroad." Thus, the antifraud provisions of the securities laws do not apply "to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses." Id. at 993.

• ***Vencap*** — *Congress did not intend for the United States to be used as a base for manufacturing fraudulent devices.* In *IIT v. Vencap, Ltd.*, handed down the same day as *Bersch*, a Luxembourg investment trust brought suit alleging fraud, conversion and corporate waste by a Bahamian corporation and various individual defendants. 519 F.2d 1001 (2d Cir. 1975) (Friendly, J.). The course of dealings was complex, the precise nature of plaintiff's allegations was unclear, and the district court's findings so deficient that the case was remanded for further explanations, so this Court did not reach a definite holding on whether jurisdiction was permissible. But the *Vencap* Court did lay out the broad principles under which United States conduct injuring overseas investors could fall within the ambit of the antifraud provisions. The Court reasoned that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for

export, even when these are peddled only to foreigners," observing that the United States would "surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." *Id.* at 1017. Echoing the holding in *Bersch*, the Court cautioned that its ruling that jurisdiction might be found on the ground that the United States should not be used as a base for manufacturing fraud was "limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries." *Id.* at 1018.

• ***Cornfeld*** — *whether injury was "directly" caused by United States activity depends on how much (or how little) was done overseas. As* relevant to our discussion here, *IIT v. Cornfeld*, involved debentures that were offered and sold almost entirely overseas. 619 F.2d 909 (2d Cir. 1980) (Friendly, J.). Defendants urged that jurisdiction was therefore wanting under *Bersch* because the conduct in the United States did not directly cause plaintiffs' alleged injuries. This Court rejected that argument as taking the holding of *Bersch* out of context. Specifically, in contrast to the offering in *Bersch*, the overseas offering in *Cornfeld* was in essence an offering of securities of an American issuer that was closely coordinated with a United States offering of securities in the same issuer. As a result, the important efforts in making the offering — including the location of the underwriters, the drafting of the prospectuses, and all of the accounting work — occurred in the United

States, and little of importance happened overseas. In other words, "[d]etermination whether American activities 'directly' caused losses to foreigners depends not only on how much was done in the United States but also on how much (here how little) was done abroad." *Id.* at 920-21.

• ***Psimenos*** — *losses are "directly" caused by United States conduct when defendant engages in substantial conduct that is material to the completion of the fraud here. Psimenos v. E.F. Hutton & Co.*, was a private action brought under the Commodity Exchange Act, but the court applied cases construing subject matter jurisdiction under the antifraud provisions of the securities laws. 722 F.2d 1041, 1044 (2d Cir. 1983). Plaintiff was a Greek national who opened an account at defendant's Athens office, and most of the fraudulent representations that gave rise to the cause of action were made there. However, plaintiff's commodity transactions were executed on American markets. After reviewing its prior decisions, this Court concluded that defendant's activities in the United States in furtherance of the fraudulent scheme were "material" and "substantial enough to establish subject matter jurisdiction." 722 F.2d at 1046. And the court characterized *Bersch* as being concerned that the United States entertain suits by aliens "only where conduct material to the completion of the fraud occurred in the United States." *Id.*

• ***Berger*** — *losses are directly caused by United States conduct when a fraudulent scheme is masterminded and implemented here.* The defendant in *SEC v. Berger*

was a resident of New York who operated an investment company organized under the laws of the British Virgin Islands that was held almost entirely by foreigners. 322 F.2d 187 (2d Cir. 2003). As part of a scheme to hide fund losses, the defendant sent false account data to the fund administrator in Bermuda, who used that data to generate inaccurate account statements that were mailed to investors. Relying on *Bersch*, defendant claimed that his conduct in the United States was merely preparatory because the final steps of preparing the statements and delivering them to investors took place overseas. The court disagreed finding that material and substantial conduct occurred in the United States for jurisdiction to lie, because defendant "masterminded and implemented" the fraudulent scheme from the United States — "the fraudulent conduct was carried out entirely" by defendant in New York. The foreign conduct in the case — preparation and mailing of statements from Bermuda — "was not itself fraudulent" because the fund administrator was merely following defendant's instructions, which provided a means for defendant "to distribute false information that he had already fraudulently concocted in the United States."[10]

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10. Additional Second Circuit cases involving the extraterritorial reach of the antifraud provisions include: *Europe and Overseas Commodity Traders v. Banque Paribas London*, 147 F.3d 118 (2d Cir. 1998); *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118 (2d Cir. 1995); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 154 (2d Cir. 1984); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir.

(Cont'd)

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B. The Second Circuit's Decisions Do Not Provide a Clear Answer to the Correct Resolution of the Jurisdictional Issue in this Case.

This Court's previous cases identify a number of potentially relevant questions, but they do not afford clear answers. For example, under these circumstances, should the domestic conduct be considered "merely preparatory," given that more conduct that was integral to the fraud occurred in the United States than occurred in *Bersch*, and the conduct reached a greater degree of completion, but the scheme could not be completed until the information was incorporated into the issuer's statements in Australia and distributed to investors there? Or should the conduct be considered sufficiently "substantial" and "material to the completion of the fraud" that it "directly" caused the injury? Was the overall scheme masterminded and implemented here or in Australia, given that it required the concurrence of wrongdoers in both places, and how should this issue be assessed under this Court's existing case law?

In addition to not pointing clearly to the answers to these questions, the existing Second Circuit case law may not provide an optimal decisional framework for addressing future cases because the existing decisions

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(Cont'd)

1972) (Friendly, J.); *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on the merits*, 405 F.2d 215 (2d Cir. 1968) (Friendly, J.). *See also North South Finance Corp. v. Al-Turk*, 100 F.3d 1046 (2d Cir. 1996).

have been decided on a case-by-case basis, without prioritizing the factors or arranging them in a unified test. In other words, while this may be a close case under the Second Circuit case law, it perhaps appears a harder case than it has to be as a result of the way this Circuit's law has developed. Therefore, the Commission believes that this Court should set forth an explicit test that both addresses the concerns reflected in the Circuit's decisions and offers more uniformity of analysis and predictability of results.

II. Adoption of the Commission's Proposed Articulation of the Conduct Test Would Bring Needed Clarity and Would Shift the Inquiry from a Case-By-Case Analysis that Turns on "Very Fine Distinctions."

The Commission recommends adoption of the following formulation of the conduct test:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

The test we propose describes when an injury is considered to be sufficiently "directly" caused by United States conduct to support jurisdiction, reflecting the fact that in *Berger* this Court upheld jurisdiction even though the last event in effectuating the fraudulent scheme did not occur in this country.

Furthermore, the formulation we recommend builds on the existing approach of this Circuit, but brings it together in a unified standard that will provide greater guidance to lower courts in resolving future cases. In *Psimenos*, the Court stated that domestic conduct must be "material to the completion of the fraud," 722 F.2d at 1046, and must have been "substantial acts in furtherance of the fraud," *id.* at 1045. Likewise, in *Berger*, the Court stated that the domestic conduct must "materially relate[] to the fraud" and must constitute "substantial acts in furtherance of the fraud." 322 F.3d at 193. *See also Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998) (expressly adopting the Second Circuit's conduct test; stating: "antifraud provisions of the securities laws [apply] when the conduct occurring in the United States directly causes the plaintiff's alleged loss *in that the conduct forms a substantial part of the alleged fraud and is material to its success*." (emphasis added)).

The materiality inquiry would ensure that the domestic conduct was an integral — not incidental or ancillary — link in the chain of events in the transnational fraud leading to the overseas investors' losses.[11] *Cf. Psimenos*, 722 F.2d at 1046 ("conduct material to the completion of the fraud" is more than "mere preparatory activities, and conduct far removed

11. The use of the term "materiality" for the jurisdictional inquiry under the conduct test should not be confused with the different concept of "materiality" as an element of a fraud violation. See *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

from the consummation of the fraud"). If the domestic conduct is deemed material, then the analysis would turn to whether, under the totality of the circumstances, the domestic conduct was substantial in relation to the entire fraud. The substantiality showing would generally be satisfied by demonstrating that a sufficient quantum of conduct occurred in the United States to reasonably warrant application of the antifraud provisions in light of the competing policy concerns identified by this Circuit. *Cf. Bersch*, 519 F.2d at 987 (domestic conduct "relatively small in comparison to [conduct] abroad"). However, even limited conduct in the United States would satisfy the substantiality showing where the particular domestic conduct was highly significant to the fraud, such as, for example, where the conduct in question involves communicating the misrepresentations to foreign investors in or from the United States, *cf.*, *Gruenthal v. Hotz*, 712 F.2d 421 (9th Cit. 1983), masterminding the scheme here, or using the United States as a base to consummate schemes concocted abroad, *cf. Psimenos*, 722 F.2d at 1047.

We believe this standard is consistent with the Court's prior cases. Those cases have indicated the result of the test's application to certain fact patterns, so it will not be necessary to apply the standard anew when those patterns recur. For instance, it is clear that jurisdiction exists when misrepresentations are made in this country. *See Bersch*, 519 F.2d at 986-87 (contrasting the facts of that case with the paradigmatic example of a gun fired from one country into another). Jurisdiction is appropriate when the mastermind of a

fraudulent scheme is operating from the United States. *See Berger*, 322 F.3d at 195. And jurisdiction lies when the transaction that consummates the fraud occurs on United States markets. *See Psimenos*, 722 F.2d at 1046.

In our view, the standard appropriately accommodates the policy concerns that underlie this Circuit's case law. This proposed standard would enable the courts to address situations in which the United States is being used as a base for fraudulent international securities schemes, while at the same time, it would allow our courts to avoid "adjudicating disputes which have little in the way of a significant connection to the United States." *Kauthar*, 149 F.3d at 667.

Moreover, adoption of this standard would help address at least two key uncertainties that appear to surround the district courts' application of the Second Circuit's existing case law. *First*, the proposed standard makes clear that the "direct cause" of the foreign investors' loss includes more than simply last action in the fraudulent chain (contrary to the defendants' argument).[12] Thus, for example, jurisdiction may lie in cases where the fraudulent statements are mailed from outside the United States, assuming that the domestic conduct was otherwise material to the fraud's success

12. We have attempted in our proposed formulation to build on the language of the existing Circuit case law, but we note that continued use of the term "directly" in articulating the conduct standard as it is presently applied in this Circuit may introduce unnecessary confusion into the analysis by suggesting a last-action requirement.

and a substantial part (either in a qualitative or quantitative sense) of the overall securities fraud.

Second, the Commission's proposed articulation reduces the uncertainty about determining whether conduct is "merely preparatory," a standard which seems to call for relatively fine distinctions about what constitutes preparatory while offering little guidance as to how those distinctions should be made. Instead, the proposed standard makes the inquiry more general by focusing on whether a material and substantial portion of the fraud occurred in the United States. In this way, it affords needed flexibility for courts to address the "numerous combinations and permutations of, for example, the parties and the types, places, timing and effects of relevant conduct that typically bear upon a determination of whether an American court may properly exercise jurisdiction to consider the merits of what are essentially foreign disputes." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d at 371.

To be sure, this standard will not provide absolute clarity, and indeed no standard likely would short of the District of Columbia Circuit's requirement that the antifraud provisions only apply where all of the elements of the securities fraud violation occurred in the United States. *See supra* pages 8-9. In our view, however, the approach of the District of Columbia Circuit would simply allow too much transnational fraudulent conduct to escape the reach of the antifraud provisions, thereby possibly permitting the United States to serve as a base for the exportation of securities fraud schemes. By

making clear that the proper focus is whether a material and substantial portion of the fraudulent conduct occurred here, the Commission's proposed standard would help move the focus away from drawing the "very fine distinctions" that district courts are currently left to make under existing Second Circuit case law and would provide a clearer test for addressing the transnational issue.

The defendants and *amici* argue that the antifraud provisions should be construed to have limited transnational application in order to preserve international comity. In making their comity argument, defendants and *amici* rely heavily on a recent Supreme Court decision delineating the transnational application of the antitrust laws. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The Commission believes that application of that case in this context is not appropriate because the comity concerns raised by the application of United States antitrust laws overseas are generally more serious than those raised by application of the securities antifraud provisions. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416, Note 3 (1987) ("In contrast to regulation under the antitrust laws, which not infrequently involved prohibition of conduct which another state favored or required, . . . United States securities regulation . . . has not resulted in state-to-state conflict."). This is particularly so in the context of prohibiting securities

fraud where the potential for conflict is less, as opposed to administrative or other regulatory requirements. [13]

The Commission also believes that the proposed standard sufficiently addresses the *amici's* concern that an over-extension of the United States securities laws to foreign corporations whose shares trade overseas may discourage their investment in the United States. This concern must be balanced against the principle that the United States should not be used as a base for engaging in fraudulent conduct that may injure foreign investors. The Commission believes that the standard proposed here strikes this balance appropriately by affording jurisdiction only where the conduct in the United States constitutes a substantial portion of the fraud that is material to the success of the scheme.

Finally, the *amici's* concerns are largely with the potential economic effects of class actions,[14] not with Commission enforcement actions or named foreign

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13. Both this Circuit and the Restatement (Third) of Foreign Relations Law recognize that the antifraud provisions of the securities laws should be applied broadly to transnational conduct. *See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416, cmt. A (1987).

14. Some of the literature refers to these suits as "F-Cubed" class actions. *See, e.g.*, JOHN C. COFFEE, JR., *Foreign Issuers Fear Global Class Actions*, THE NATIONAL LAW JOURNAL (June 14, 2007).

plaintiffs' suits. As a result, to the extent that the Court is persuaded by the *amici*, it would be more appropriate to address those issues by developing a heightened jurisdictional standard for class actions, *see supra* note 1. To be sure, Commission enforcement actions *might* be thought to pose a threat of similar magnitude to foreign companies through possible disgorgement awards and civil penalties, but any actual threat to comity that materializes could be accommodated by the Commission as it decides whether to issue a formal order of private investigation, *see* Securities Exchange Act § 21(a)(1), 15 U.S.C. § 78u(a)(l), initiate litigation, or accept a settlement.

III. Under the Commission's Proposed Articulation of the Conduct Test, the Antifraud Provisions Would Apply Here.

The Commission believes that the defendants' domestic conduct was both material to the scheme's success and a substantial part of the alleged fraud.

Based on the allegations in the complaint, the Commission believes that the defendants' conduct in the United States was material to the successful completion of the fraud. The information that made the statements in Australia false was generated in the United States with the expectation that it would be distributed to foreign investors. Without this domestic misconduct, there would have been no fraudulent release of information in Australia nor a resulting inflation of NAB's stock. Thus, the domestic conduct was an integral

link in the chain of events leading to the overseas investors' losses.

Likewise, the HomeSide defendants are alleged to have conceived the scheme in Florida. *See, e.g., Vencap*, 519 F.2d at 1017-18 (allegations suggested scheme conceived in New York); *Berger*, 322 F.3d at 194-94 (evidence demonstrated scheme conceived in New York). The HomeSide defendants then took numerous significant steps in the United States to perpetrate that scheme by manipulating the assumptions in HomeSide's MSR valuation modes, generating the fraudulent valuations using those models, and then transmitting the fraudulent valuations to NAB's headquarters in Australia with the knowledge that this information would be incorporated in the parent's financials. In our view, this domestic conduct was a substantial part of this transnational fraud.[15]

15. As previously stated, *see supra* notes 4, 5 & 7, defendant NAB made filings with the Commission containing the allegedly fraudulent information and the company's ADRs traded on an American exchange. This conduct in the United States alone would have afforded the Commission jurisdiction to bring an enforcement action. In this brief, however, we assume the only relevant conduct is that alleged by the plaintiffs as a basis for jurisdiction over the foreign class members' claims.

Appendix C

CONCLUSION

In the Commission's view, at least in the context of Commission enforcement actions and suits by named foreign plaintiffs, the antifraud provisions of the securities laws apply to transnational securities frauds that principally or exclusively result in losses to overseas investors so long as the domestic conduct was both material to the scheme's success and a substantial part of the alleged fraud. Furthermore, the Commission believes that the allegations in this case satisfy this proposed standard.

Respectfully submitted,

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September 17, 2008

APPENDIX D — RELEVANT STATUTE
15 U.S.C.A. § 78j

Effective: December 21, 2000

United States Code Annotated Currentness

Title 15. Commerce and Trade

Chapter 2B. Securities Exchanges (Refs & Annos)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement

(as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

APPENDIX E — RELEVANT CODE 17 C.F.R. § 240.10b-5

17 C.F.R. § 240.10b-5

Code of Federal Regulations Currentness

Title 17. Commodity and Securities Exchanges

Chapter II. Securities and Exchange Commission

Part 240. General Rules and Regulations, Securities Exchange Act of 1934 (Refs & Annos)

Subpart A. Rules and Regulations Under the Securities Exchange Act of 1934

Manipulative and Deceptive Devices and Contrivances

§ 240.10b-5 Employment of manipulative and deceptive devices.

<Notes of Decisions for 17 CFR § 240.10b-5 are displayed in separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For text of section, and references, see first document for 17 CFR § 240.10b-5. For Notes of Decisions for subdivisions X to end, see documents for 17 CFR § 240.10b-5, post.>

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

Appendix E

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Authority: Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

OPPOSITION BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether the judicially implied private right of action under Section 10(b) of the Securities and Exchange Act of 1934 should, in the absence of any expression of congressional intent, be extended to permit fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company, when the claims arose under what the court of appeals called a "particular mix" of "novel[]" and "unusual" circumstances, Pet. App. 10a, 22a—namely, that (1) the conduct that was central to the alleged fraud, and that directly caused the alleged foreign losses, occurred in a foreign country, (2) only a lengthy chain of causation linked the alleged domestic conduct to the claimed foreign losses, and (3) there was no meaningful effect on American investors or American capital markets.

RULE 29.6 STATEMENT

Respondent National Australia Bank Limited has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

HomeSide Lending, Inc., which was named as a defendant below and as a respondent in this Court, no longer exists. It was succeeded in interest by Washington Mutual Bank (formerly Washington Mutual Bank, F.A.), which was a wholly owned subsidiary of Washington Mutual, Inc., a publicly traded company. On September 25, 2008, pursuant to Section 5(d)(2)(A) of the Home Owner's Loan Act, 12 U.S.C. § 1464(d)(2)(A), the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation to be Washington Mutual Bank's receiver. *Receivership of a Fed. Savs. Ass'n*, Order No. 2008-36, OTS No. 08551, 2008 OTS DD LEXIS 19 (Office of Thrift Supervision Sept. 25, 2008).

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IN THE

Supreme Court of the United States

No. 08-1191

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. Founded in 1858, headquartered in Melbourne, Australia, and organized under Australian law, respondent National Australia Bank Limited ("NAB") was Australia's largest bank and financial institution during the period covered by the complaint. The bank's common equity consists of its "ordinary shares." For decades, NAB's ordinary shares have principally traded on the Australian Stock Exchange

("ASX"), now the Australian Securities Exchange; they traded as well on the London, Tokyo, and New Zealand stock exchanges. Australian law requires NAB to file extensive annual and semiannual disclosures with Australia's national securities regulator, the Australian Securities and Investment Commission. As a listed company on the ASX, NAB must also file additional "continuous" disclosures with that exchange. Australian law allows shareholders to sue issuers for securities fraud in Australian courts; it also provides for opt-out class actions as well.

NAB's ordinary shares *never* traded on any exchange in the United States, Pet. App. 2a, and in 1999, during the period covered by the complaint, *99.98* percent of the ordinary shares were held by investors *outside* the United States, C.A. App. 284. NAB issued American Depositary Receipts, or ADRs, that represented indirect interests in the ordinary shares and traded on the New York Stock Exchange. Pet. App. 2a, 25a. ADRs held by Americans represented only a tiny fraction of NAB's equity capitalization: in 1999, only 200 of the ADR holders had addresses in the United States, and their holdings represented only *1.1* percent of the company's ordinary shares. C.A. App. 280; Pet. App. 33a. Because of the ADRs, NAB filed its Australian disclosures with the SEC on Forms 6-K and 20-F. As the district court noted, however, petitioners "do not allege that they were even aware of the SEC filings, much less relied upon them." Pet. App. 42a n.9.[1]

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[1] Indeed, under the fraud-on-the-market theory of reliance that petitioners invoke, *see* p. 6, *infra*, there could not have been reliance upon, or loss caused by, the SEC filings: the filings with the SEC typically took place roughly two weeks *after* the original disclosures were first publicly released in Australia, *see*,

2. Petitioners' allegations of fraud stemmed entirely from disclosures NAB made in Australia about HomeSide Lending, Inc., a wholly owned NAB subsidiary based in Jacksonville, Florida. HomeSide was a mortgage servicer; in exchange for fees, it collected mortgage payments from homeowners and, from these collections, passed on payments to investors in mortgage-backed securities, to insurers, to taxing authorities, and to others. Rights to collect the mortgage servicing fees are called "mortgage servicing rights," or MSRs, and, under applicable accounting principles, were booked as assets of HomeSide and NAB.

As with other kinds of mortgage-related assets, valuing MSRs requires the use of complex models that involve business judgments and predictions about the future—most importantly, predictions about future interest rates and whether, in response to those predicted rates, homeowners will decide to prepay their mortgages. If interest rates fall, then homeowners become more likely to prepay their mortgages, which reduces the fees that the mortgage servicer can expect to receive. Predicting interest rates and prepayments is a treacherous task: not only is it difficult, if not impossible, to predict future interest rates, but there is in fact "no way to accurately anticipate the amount of prepayments that will result from changes in interest rates or other economic conditions."[2] As even the complaint acknowledged, different companies made different predictions

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e.g., C.A. App. 277, 290, 606-07, 622, meaning that the filings could not have affected share prices on an efficient market.

[2] Edward L. Pittman, *Economic and Regulatory Developments Affecting Mortgage Related Securities*, 64 NOTRE DAME L. REV. 497, 504 (1989).

on what prepayment rates would be. *See* C.A. App. 103 ("Bloomberg shows *each Wall Street firm's* view on prepayments" (emphasis added)). And as articles relied upon in the complaint made clear, MSR values were highly volatile: for example, "a 1 percent cut in [interest rates] would cut the value of the MSRs by 7 percent, [and] a 2 percent drop would slash it by nearly *two-fifths*." C.A. App. 1257 (emphasis added). Petitioners claim that differences between HomeSide's modeling assumptions and those made by other firms amounted to fraud; in fact, those differences resulted from good-faith judgments and a mistake.

At all events, thanks to an unprecedented series of interest rate cuts, 2001 ended up being a very bad year for MSRs: by year-end, rates had reached *40-year* lows. Partly as a result, NAB twice wrote down the carrying value of HomeSide's MSRs. The first write-down, in the amount of AU$888 million, took place on July 5, 2001; NAB's announcement, issued in Melbourne, Australia, stated that the write-down reflected "[u]nprecedented refinancing activity" caused by interest rate cuts in the United States.

The second MSR write-down, which NAB announced in Australia on September 3, 2001, was much larger—AU$3.05 billion. After the first write-down, NAB hired an outside consultant to help it estimate a sale value for HomeSide as a whole. During the course of the consultant's work, HomeSide discovered that it had been using a mistaken interest rate assumption in its MSR valuation model, and that other assumptions in the model had to be changed in light of, as NAB's announcement put it, "continued unprecedented uncertainty and turbulence in the mortgage servicing market." NAB accordingly wrote down AU$755 million for the interest-

rate mistake and AU$1.436 billion for the other changed assumptions. NAB also wrote down AU$858 million in goodwill because it had decided to sell HomeSide and to get out of the mortgage servicing business in the United States.

These losses at the nation's largest bank sparked an uproar in Australia, as the financial press there considered the write-down to be the "biggest investment disaster in Australian corporate history." C.A. App. 1258. On September 3, 2001, the price of NAB's ordinary shares dropped AU$4.30, from AU$33.20 to AU$28.90, on the ASX. The stock soon recovered, however, as NAB quickly moved to recoup its losses by selling HomeSide's assets; by February 2002, the ordinary shares traded as high as AU$34.80, *ibid.*—higher than they traded just before the second write-down was announced.

3. In late 2003, two putative class actions alleging violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), were filed in the Southern District of New York against NAB, HomeSide, and the individual respondents. The actions were consolidated, and the consolidated amended complaint, at issue here, asserted claims on behalf of three Australian named plaintiffs—Russell Leslie Owen, and Brian and Geraldine Silverlock—who purchased NAB ordinary shares on the ASX.[3] No class was ever certified because no motion for class certification was ever made.

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[3] The remaining named plaintiff, Robert Morrison, is an American who purchased ADRs, and although he is listed as a petitioner in this Court, his claims are not at issue. The district court dismissed Morrison's claims on the ground that he had failed to allege any damages, Pet. App. 43a-45a, and in the court of appeals, petitioners "focus[ed] exclusively on the claims of the

The complaint squarely alleged that Australians had committed a securities fraud in Australia upon Australians. It claimed that NAB made false and misleading statements about HomeSide, and that NAB had caused HomeSide's MSR valuations to be inflated. The complaint asserted on page two that HomeSide "used unreasonably optimistic valuation assumptions or methodologies"—but that it did so "*[a]s a result of NAB's conduct* in connection with HomeSide's financial modeling." C.A. App. 71 (emphasis added). And paragraph one on page one summed up the claim: "This action involves the *dissemination of materially false and misleading statements* during the Class Period concerning *fraud by NAB* at its subsidiary, HomeSide Lending, Inc." *Id.* at 70-71 (emphasis added). Relying on the fraud-on-the-market presumption of reliance, *see Basic Inc. v. Levinson*, 485 U.S. 224, 242-47 (1988), petitioners alleged that these "material misrepresentations and omissions" "directly or proximately caused" their losses by "inflating the price of NAB's securities." C.A. App. 112. For the Australian petitioners, of course, this loss-causing price inflation occurred *in Australia*, on the ASX.

And *every single one* of the alleged misstatements and omissions about the value of HomeSide's MSRs was made *in Australia* by NAB itself. The complaint cites and quotes at length no fewer than seven earnings and other market releases issued by NAB's annual reports for 1999 and 2000. *Id.* at 86-91, 93-94. As the documents themselves reflect, NAB's disclo-

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Foreign Plaintiffs and [did] not challenge the dismissal of [Morrison's] claims," *id.* at 5a n.3. In this Court, petitioners state that the claims of ADR holders such as Morrison "are not encompassed within the proposed plaintiff class." Pet. 6 n.2.

sures were prepared and issued *in Australia, e.g., id.* at 190, 277, 496, 606, 1265, and contained financial statements that were audited by an Australian accounting firm, *e.g., id.* at 277, 607. The complaint quotes statements made in these disclosures by NAB's Australia-based chief executive, respondent Frank Cicutto, *id.* at 86-87, 89-91, 93-94, statements made by NAB at an investor lunch in Sydney, *id.* at 94-95, and statements attributed to the company in the *Australian Financial Review*, Australia's leading financial publication, *id.* at 89, 92-94.

4. Respondents moved to dismiss the Australian petitioners' claims on the ground that they exceeded the territorial reach of the federal securities laws; the district court granted the motion. Pet. App. 23a.[4] In addressing the extraterritoriality question, the district court applied a four-decade-old body of case law that, as the court of appeals noted, "largely grew out of a series of opinions [the court of appeals] issued between 1968 and 1983." *Id.* at 11a.[5] These cases established an "effects test" and a "conduct test" to define the territorial scope of the federal securities laws. In general terms, the "'effects test'" looks to

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[4] Respondents also argued that petitioners had failed sufficiently to plead scienter under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2), and Fed. R. Civ. P. 9(b), and that petitioners had otherwise failed to state a claim. The district court did not address these contentions.

[5] *See, e.g., Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1044-46 (2d Cir. 1983); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-93 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016-18 (2d Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-37 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 (2d Cir.), *modified en banc on other grounds*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969).

"whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and the "'conduct test'" examines "whether the wrongful conduct occurred in the United States." *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). The conduct test, in particular, is a standard of direct causation: it holds that the federal securities laws apply to transnational frauds "only when 'substantial acts in furtherance of the fraud were committed within the United States,'" and is met only when "'the defendant's activities in the United States were more than "merely preparatory" to a securities fraud elsewhere' and . . . the 'activities or culpable failures to act within the United States "directly caused" the claimed losses.'" *Id.* at 193 (citations omitted).

The district court held that the Australian petitioners' claims failed both tests. As for the effects test, the court noted that the Australian petitioners "do not appear to contend" that "the alleged fraud had [any] demonstrable effect on the United States market." Pet. App. 33a. As for the conduct test, the court concluded that "a significant, if not predominant, amount of the material conduct in this case occurred a half-world away." *Id.* at 39a. "That the allegedly false statements pertained to NAB's domestically based subsidiary does not change the result," the court added, because "HomeSide's alleged conduct" in the United States "is not in itself *securities* fraud, but amounts to, at most a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 39a, 41a. In particular, the district court emphasized that *all* of the elements of the Australian plaintiffs' claims took place in Australia: "(i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv)

who detrimentally relied on the information in purchasing securities abroad." *Id.* at 41a-42a.

5. The court of appeals affirmed. Pet. App. 1a. The court remarked the "novelty" and the "unusual fact-pattern" of the case, which it said was the "first so-called 'foreign-cubed' securities class action"—involving "(1) *foreign* plaintiffs . . . suing (2) a *foreign* issuer . . . based on securities transactions in (3) *foreign* countries"—"to reach this Circuit." *Id.* at 10a-11a. The court nevertheless held that its "usual rules" governing the extraterritorial application of the federal securities laws—the conduct and effects tests—"still apply." *Id.* at 11a. Noting, as did the district court, that petitioners "rel[ied] solely on the conduct component of the test," *id.* at 8a, the court of appeals proceeded to apply that test standing alone.

The court of appeals explained that application of the conduct test required it to "identify which action or actions constituted the fraud and directly caused harm, . . . and then [to] determine if that act or those actions emanated from the United States." *Id.* at 13a-14a. The court stated that the analysis "boils down to what conduct comprises the heart of the alleged fraud." *Id.* at 18a. Petitioners argued that the heart of the fraud took place in Florida, at HomeSide: that "if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5." Pet. App. 18a. In essence, petitioners contended that the court of appeals' conduct test could be satisfied by a but-for, and not direct, causal link between the domestic conduct and their foreign losses.

The court of appeals rejected these arguments. "The actions taken and the actions not taken by NAB

in Australia," the court concluded, were "significantly more central to the [alleged] fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a.

The court cited three factors in support of its conclusion. The first was the fact that, as was reflected on the face of the lengthy NAB disclosures in the record, there was extensive activity in Australia involved in preparing the documents and statements that allegedly caused petitioners harm. It was NAB in Australia, not HomeSide in Florida, that was "the publicly-traded company," the court observed, and accordingly it was NAB's Australian "executives—assisted by lawyers, accountants, and bankers—[who took] primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world." *Ibid.* These facts were critical to the causation analysis, the court concluded, because "Rule 10b-5(b)," upon which petitioners relied, "focuses on the accuracy of *statements* to the public and to potential investors," and "[l]iability [thus] requires a false or misleading statement" to investors. *Id.* at 20a.[6]

The second "significant factor" cited by the court was "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets." *Id.* at 20a. The fact that the petitioners "do not contend that what [respondents] allegedly did had any meaningful effect on America's investors or its capital markets," the court of appeals held, "weighs against our exercise of subject matter jurisdiction." *Id.* at 20a-21.

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[6] The court of appeals held that petitioners had waived their claims under Rules 10b-5(a) and (c), 17 C.F.R. §§ 240.10b-5(a), (c). Pet. App. 20a n.7.

The third and final factor was "the lengthy chain of causation between the American contribution to the [alleged] misstatements and the harm to investors." *Id.* at 21a. "HomeSide sent allegedly falsified numbers to Australia," the court of appeals observed, but "numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors," and petitioners did not "contend that HomeSide sent any falsified numbers directly to investors." *Ibid.* Indeed, the court of appeals noted that, given the absence of any domestic statements or acts communicated to Australian investors, the alleged domestic conduct could not have supported a finding of reliance, and thus liability, under this Court's decision in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008). Pet. App. 21a.

"This particular mix of factors," the court of appeals concluded, "add[s] up to a determination that we lack subject matter jurisdiction." *Id.* at 22a.[7]

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[7] The courts of appeals and the district courts have consistently treated issues involving the territorial reach of the securities laws as questions of "subject matter jurisdiction." These "drive-by jurisdictional rulings" should have been rulings on the merits, *e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-16 (2006), but this makes no difference to the outcome here. *See also AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 153 (2d Cir. 1984) (acknowledging that treatment of conduct test as jurisdictional may be incorrect).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals does not conflict with any decision of another court of appeals. Nor does it conflict with any decision of this Court; in fact, it reaches the only result permissible under this Court's precedents governing the extraterritorial application of federal law. At most, petitioners challenge the fact-bound application of a fact-sensitive standard to what the court of appeals called a "particular mix" of "novel[]" and "unusual" circumstances. Pet. App. 10a, 22a. Further review is not warranted.

1. The courts of appeals are not, as petitioners and their amicus contend, "deeply fractured" and in "entrenched" conflict on the territorial scope of Section 10(b). Pet. 10, 14; *see also* NASCAT Br. 6-7. Indeed, the claim of a circuit split is refuted by the fact that the *only* case petitioners specifically identify as "reaching [a] different result[] on essentially identical facts" is a *district court* settlement approval that relies exclusively on *Second Circuit* authority and is now on appeal in the Eleventh Circuit. Pet. 4n.1, 16 (citing *In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-T-27TBM, 2008 WL 4663363, at *1-*2 (M.D. Fla. Oct. 21, 2008) (citing and quoting *SEC v. Berger*, 322 F.3d 187, 192-95 (2d Cir. 2003)), *appeal docketed*, No. 08-16334 (11th Cir. Nov. 7, 2008)).

The court of appeals decisions cited by petitioners and their amicus do not conflict with the decision below. All apply the conduct test, and all rely upon Second Circuit authority in doing so. The material differences among these cases arise not from the slightly varying verbal formulations they use, but from the fact that the conduct test, by its nature, is highly fact-intensive, and in its application, is highly fact-bound. As the court of appeals put it below,

applying the conduct test is "an involved undertaking," Pet. App. 15a, and, as the district court noted, the "complexity of the required analysis means that individual cases are decided on very fine distinctions," *id.* at 32a. As three courts of appeals have observed, in any given case "the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive." *Cont'l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979), *quoted in IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), and *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1980).

a. Far from conflicting with the decision below, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), save for one immaterial point, conforms to it. *Zoelsch* involved precisely the sort of "lengthy chain of causation" that is at issue here, Pet. App. 21a, and reached the same result for essentially the same reasons. The defendant, an American accounting firm, allegedly gave inaccurate information to a German accounting firm. The information concerned the United States assets of a German investment partnership. The German accounting firm, in turn, incorporated the information into a report that was provided in Germany to the German plaintiffs, who relied to their detriment upon misstatements and omissions in the report when they invested in the German partnership. 824 F.2d at 28-29.

In affirming the dismissal of the complaint, the District of Columbia Circuit expressly "defer[red] to *Bersch* and later Second Circuit cases and adopt[ed] the Second Circuit's approach." *Id.* at 32. The D.C. Circuit correctly noted that, under the Second Cir-

cuit's approach, courts "decline[] jurisdiction over alleged violations of the securities laws based on conduct in the United States when the conduct here was 'merely preparatory' to the alleged fraud, that is, when the conduct here did not 'directly cause' the losses elsewhere." *Id.* at 30 (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992-93 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), and *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975)). The court concluded that the American accounting firm's activities "were 'merely preparatory' to any fraud perpetrated on West German investors, . . . did not 'directly cause' their losses, [and were] relatively small in comparison to those abroad." *Id.* at 35 (quoting *Bersch*, 519 F.2d at 987, 992-93).

To be sure, as the court below noted, the D.C. Circuit may have made "'a bit of an overstatement'" when it "hypothesized" that, under the Second Circuit standard, "'jurisdiction will lie [only] where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5.'" Pet. App. 11a n.6 (quoting *Robinson v. TCI/US W. Commc'ns*, 117 F.3d 900, 905 n.10 (5th Cir. 1997), and *Zoelsch*, 824 F.2d at 31). But the overstatement made no difference to the result in *Zoelsch*: what controlled were the fact that the American firm's "statements were not themselves made for distribution to the public, and were not transmitted to the public," and the fact that it was the *foreign* firm that, in a foreign country, "alone" "prepared and certified" the "report [that] was circulated to investors" in that foreign country, 824 F.2d at 34—which happen to be *precisely* the circumstances the Second Circuit deemed controlling here, *see* Pet. App. 19a-21a. There is no conflict.

b. Nor does the decision below conflict with the Third, Eighth, and Ninth Circuit decisions cited by petitioners and their amicus. *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), involved far more extensive and significant domestic conduct than was alleged here. The case involved "a 'ponzi'-like scheme" in which the American defendants, while operating *in the United States*, had fraudulently induced a foreign investor to buy shares in two *New Jersey-based* companies that the defendants looted and bankrupted. The Third Circuit noted that "various negotiations" with the foreign investor had occurred *in the United States*, that "execution of a key investment contract" took place "*in New York*," that defendants had maintained *in the United States* "records that were crucial to the *consummation* of the fraud," and that they had used "the *New York* office of a Swiss bank as a conduit for moneys received from [the victim]." *Id.* at 111, 115 (emphasis added).

The Third Circuit held that this more than sufficed to support the application of the federal securities laws. In so holding, the court discussed, approved, followed, and applied the Second Circuit's decisions in *Bersch* and *Vencap*, which it described as "leading opinions" issued by "'the Mother Court'" of securities law, "a court with especial expertise in matters pertaining to securities." *Id.* at 113, 115 & n.29 (citation omitted). Given the critical fraudulent conduct that had occurred in the United States, the Third Circuit concluded that "the conduct of the defendants here cannot be deemed to be 'mere[ly] preparatory' to fraudulent acts committed outside this country," and "question[ed] whether it can be convincingly maintained that such acts within the United States did not directly cause any extraterritorial losses." *Id.* at

115 (quoting *Vencap*, 519 F.2d at 1018, and discussing *Bersch*, 519 F.2d at 993). As a consequence, the court concluded that the Second Circuit's "prior pronouncements . . . len[t] great support" to its conclusion that the federal securities laws applied. *Id.*

The Eighth Circuit's decision in *Continental Grain*, 592 F.2d 409, likewise involved a straightforward application of the Second Circuit's conduct test to far more significant domestic conduct than was alleged here. The Australian plaintiff there purchased all of the stock of an Australian company from the defendant sellers, who included a corporation and an individual from California; the alleged fraud was that the defendants had failed to disclose the imminent termination of a material contract of the company they were selling. *Id.* at 411-12. In contrast to the case at bar, the critical failure to disclose occurred *in the United States*: the contract of sale was executed by two of the defendants in California, *id.* at 412, and the defendants, while "*in the United States*," wrote "letters and [made] telephone calls [that] in fact, constituted the organization *and completion* of the fraud," *id.* at 420 (emphasis added).

Quoting *Vencap* and *Bersch*, the Eighth Circuit held that, for the federal securities laws to apply, "[t]he conduct in the United States cannot be 'merely preparatory,' and must be material, that is, 'directly cause the losses.'" *Ibid.* (quoting *Vencap*, 519 F.2d at 1018, and *Bersch*, 519 F.2d at 993). The court held that this standard had been met because "the failure to disclose" was not only "*directed* from the United States," it was "*completed* in the United States," and the "defendants' conduct in the United States . . . was significant to [the] *accomplishment*" of the "'scheme of nondisclosure' [that] is *the heart of* Continental's al-

legation of securities fraud." *Id.* at 412, 420-21 (emphasis added). That is entirely consistent with Second Circuit case law, which has looked to whether "the fraudulent scheme was *masterminded and implemented* . . . in the United States," *Berger*, 322 F.3d at 194 (emphasis added),[8] to whether "conduct material to the *completion* of the fraud occurred in the United States," *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (emphasis added), and, in general, "to what conduct comprises *the heart of* the alleged fraud," Pet. App. 18a (emphasis added).

Nor, finally, does any conflict exist with *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983). There, as petitioners note, the Ninth Circuit adopted the standard set out in *Continental Grain*: "'The conduct in the United States cannot be merely preparatory . . . and must be material, that is, directly cause the losses.'" *Id.* at 424 (quoting *Cont'l Grain*, 592 F.2d at 420). Again, that language came straight out of *Bersch* and *Vencap*, the leading Second Circuit cases. And the application of the law to the facts was entirely consistent with the Second Circuit authorities as well: although *Grunenthal* involved the sale by the foreign defendants to the foreign plaintiff of all the stock of a Mexican corporation, the meeting "at which the agreement was signed, was held *in Los Angeles*, California." *Id.* at 422 (emphasis added). Not only that, it was during the meeting *in Los Angeles* that

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[8] Cases like the Second Circuit's decision in *Berger*, which involved a fraudulent transnational investment scam controlled, masterminded, and implemented from New York, make clear that frauds such as the "alleged Madoff and Stanford Ponzi schemes," NASCAT Br. 8; *see also* Pet. 5, 17, fall well within the scope of the conduct test in any of the circuits. *See, e.g., Berger*, 322 F.3d at 188-91, 194-95; *Kasser*, 548 F.2d at 110-12, 114-15.

the critical misrepresentation—that one of the defendants controlled the Mexican corporation—was "confirmed" by that defendant's "silence" and by his "signing of th[e] agreement." *Id.* at 425.

So the fraud in *Grunenthal* was consummated, and the critical misrepresentation was made, *in the United States.* These facts led the court to apply the federal securities laws. *Id.* at 425-26. More to the point here, the Ninth Circuit noted that its "[a]ssertion of jurisdiction under the facts of this case is not inconsistent with the approach taken by the Second Circuit," and observed that the Second Circuit had previously quoted language from *Continental Grain* "with approval." *Id.* at 426 (citing *Bersch*, 519 F.2d at 993; *Vencap*, 519 F.2d at 1018; and *Cornfeld*, 619 F.2d at 918). There is no split among the courts of appeals.

2. Even if a circuit split could be said to exist, this case would be a poor vehicle to resolve it. Given the facts, this case would come out the same way no matter which circuit's law were applied. That is most obviously so with the D.C. Circuit: if the standard there is that the domestic conduct must "comprise[] all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5," Pet. App. 11a n.6 (quoting *Zoelsch*, 824 F.2d at 31), the complaint here would fail that standard. Not only is it true that *not all* of the elements of the fraud took place in the United States, but it is also a fact that *none* of the elements occurred here. The allegedly fraudulent statements to investors, the allegedly fraudulent intent in making those statements, the purchase and sale of securities, the asserted reliance or causation, and the claimed losses—*all of the elements of the Australian petitioners' claims* took place,

as the courts below recognized, *in Australia*. *See* Pet. App. 19a-22a, 41a-42a.

The other circuits would reach the same result here as well. The Ninth Circuit, in fact, has affirmed the dismissal of a case quite like this one. *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), though not a class action, was a "foreign-cubed" case like this one: it had foreign plaintiffs, foreign defendants, and an alleged fraud involving purchases on a foreign exchange. "The sale occurred outside the United States . . . . The fraud alleged was a fraud committed by foreign individuals on a foreign corporation in a foreign country." *Id.* at 290. As with HomeSide in the case at bar, the only connection to the United States was that the underlying business was located here: the foreign company conducting the offering was formed to engage in mining in Montana, and the "assets underlying [the] stock" consisted of "mining property in Montana." *Id.* at 288-91.

In language very much like that used by the district court about NAB and HomeSide here, the Ninth Circuit in *Butte Mining* distinguished the Eighth Circuit's decision in *Continental Grain* and held that the federal securities laws did not apply:

> As far as the securities laws of the United States are concerned, the land transaction in Montana and the formation of the [subsidiary] corporations in Montana were not acts of securities fraud. They merely, at most, were steps that the Defendants allegedly took before bringing off the transaction in the United Kingdom said to have defrauded Butte. These preparatory actions did not furnish the district court with jurisdiction. The alleged facts are sharply distinguishable from those alleged in *Continental Grain* . . . We

> are not to be a haven for scoundrels; nor should we be a host for the world's victims of securities fraud.

Id. at 291; *cf.* Pet. App. 41a. This case would thus come out no differently in the Eighth and Ninth Circuits.

As for the Third Circuit, that court has not addressed a case like this one—but district courts in that circuit have dismissed two. *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366 (D. Del. 2006); *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567 (W.D. Pa. 2002). Both cases involved foreign-cubed fraud-on-a-foreign-market class actions like this one; both involved foreign investors' claims that they had purchased shares of a foreign company on a foreign exchange at prices allegedly inflated because of the foreign company's misstatements or omissions about events or operations in the United States; and both courts, applying Third Circuit law (which they understood to be substantially the same as that in the Second Circuit), held that the federal securities laws did not apply. *See Daimler-Benz*, 410 F. Supp. 2d at 367-68, 370-74; *Marconi*, 225 F. Supp. 2d at 576-81. As one of the district courts put it: "Simply making fraudulent statements about what is happening in the United States does not make those statements 'United States conduct' for purposes of the conduct test." *Marconi*, 225 F. Supp. 2d at 578. These cases and *Butte Mining* refute petitioners' conclusory claim that they "would prevail" under the standards used in the Third, Eighth, and Ninth Circuits, Pet. 15, and make clear that this case would not serve as a good vehicle to resolve the conflict they assert.

3. Petitioners and their amicus make no suggestion that the decision below conflicts with any

decision of this Court; indeed, the petition cites not one case decided by this Court. It is easy to see why.

Petitioners and their amicus concede, as they must, that the Securities Exchange Act of 1934 "furnish[es] no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions." *Zoelsch v. Arthur Andersen*, 824 F.2d at 30, *quoted in* Pet. 10; *see also* NASCAT Br. 5. For decades, the courts of appeals have recognized that there is no evidence of congressional intent to support the conduct test: "We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond." *Bersch*, 519 F.2d at 993. The conduct test thus reflects a "dubious" effort to "discern[] a purely hypothetical legislative intent." *Zoelsch*, 824 F.2d at 30. Indeed, to the extent there is any relevant evidence of legislative intent, it indicates that Congress "chose to protect *only* those investors whose trades occur inside the United States." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 681 (1990) (emphasis added).

At the very least, this means that the conduct test must not be read generously—and that the decision below unquestionably reached the right result. This Court has consistently upheld the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply *only* within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (emphasis added; quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Here, not

only is the relevant statute, Section 10(b) of the Securities Exchange Act of 1934, "silent as to its extraterritorial application," *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991), but it also may be said to be *doubly* silent. Even as applied domestically, the private right of action under Section 10(b) is entirely "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008). And since implied rights "'run[] contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation,"' this Court has now made clear that "[t]he decision to extend [an implied] cause of action is for Congress, not for us," and that "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Id.* at 772-73 (citations omitted).

As a result, there is even *less* of a basis here for extraterritorial application of federal law than there was in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). The relevant statutes in those cases not only provide explicitly for private rights, but, as this Court noted, they also *expressly* provide for *some* degree of extraterritorial application; the question was how much.[9] Indeed, the Court

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[9] The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") expressly places "within the Sherman Act's reach" extraterritorial conduct that "has a 'direct, substantial, and reasonably foreseeable effect'" on American commerce, where the effect "'giv[es] rise to a [Sherman Act] claim.'" *Empagran*, 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)). The Patent Act expressly provides that anyone who "'supplies or causes to be supplied in or from the United States all or a portion of the components of a patented invention . . . in such manner as to actively

noted in *Empagran* that arguably "the more natural reading" of the FTAIA was the one that would have sustained the foreign plaintiffs' claims, 542 U.S. at 174, and observed in *Microsoft* that "[p]lausible arguments can be made both for and against" the parties' constructions of 35 U.S.C. § 271(f), 550 U.S. at 442.

Yet in both cases, the Court held that the presumption against extraterritoriality required that the statutes not be applied extraterritorially. *Empagran*, 542 U.S. at 164-69; *Microsoft*, 550 U.S. at 454-56. The Court so held in *Microsoft* even though a domestic plaintiff had sued a domestic defendant for what was, in substantial part, domestic conduct (supplying components of a patented invention from the United States to places abroad). *Microsoft*, 550 U.S. at 445-47. And it so held in *Empagran*—which upheld the dismissal of what could be called a "foreign-cubed" antitrust case (foreign plaintiffs, foreign defendants, and foreign purchases and damages)—even though the foreign plaintiffs had alleged a global conspiracy in which "some of the anticompetitive price-fixing conduct alleged here took place in *America*." *Empagran*, 542 U.S. at 165 (emphasis in original).

The fact that petitioners' claims are securities-fraud claims offers no escape from the presumption against extraterritoriality. Contrary to the suggestions made below by petitioners, the SEC, and the court of appeals, the presumption is not suspended by

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induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination had occurred within the United States, shall be liable as an infringer.'" *Microsoft*, 550 U.S. at 445 (quoting 35 U.S.C. § 271(f)(1)). "Congress enacted § 271(f) specifically to extend the reach of United States patent law to cover certain activity abroad." *Id.* at 455.

the fact that "anti-fraud enforcement objectives are broadly similar" because governments throughout the world "are generally in agreement that fraud should be discouraged." Pet. App. 17a. This Court rejected just such a contention in *Empagran*, where the respondents pointed out "that many nations have adopted antitrust laws similar to our own." 542 U.S. at 167. The Court answered that "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Ibid.* That is no less true of securities fraud than price-fixing: establishing securities-fraud enforcement or compensation schemes involves a myriad of substantive and procedural choices about which nations can, do, and will, disagree. "The presumption that United States law governs domestically but does not rule the world," *Microsoft*, 550 U.S. at 454, applies with full force here.

4. Finally, the emphasis petitioners and their amicus place upon the SEC's invitation brief below only confirms that this case is unworthy of certiorari. As petitioners observe, the agency's thesis was that "the Second Circuit's case law on the 'conduct test' can be read to set forth a series of 'diverse formulations' of the applicable legal standard." Pet. 17 (quoting Pet. App. 49a (citation omitted)). The SEC complained that there was some "'tension' in the case law" *within* the circuit on the conduct test, and that district judges had been deciding cases by "engaging in . . . case-by-case comparison[s] of . . . specific fact patterns" and by making "'very fine distinctions.'" Pet. App. 49a (citations omitted).[10]

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[10] The SEC suggested that the court of appeals could solve the supposed problem and "bring needed clarity" to the conduct test, not by overruling any cases, but by emphasizing the words

The SEC's concerns about the Second Circuit's precedents do not justify further review here. This Court, of course, does not sit to review intra-circuit splits. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (dismissing certificate), and the proper device to resolve any "conflict of views which has arisen among the judges of [a court of appeals]" is "to apply for a hearing before the court en banc," *United States ex rel. Robinson v. Johnston*, 316 U.S. 649, 649 (1942) (per curiam), something petitioners chose not to do. When all is said and done, what petitioners complain of here is a court of appeals' fact-bound application of a fact-sensitive standard to what the court considered to be a "particular mix" of "novel[]" and "unusual" facts. Pet. App. 10a, 22a. That does not warrant review by this Court.

"material" and "substantial" instead of the phrases "merely preparatory" and "directly caused." Pet. App. 48a, 63a-66a, 68a-73a. But the proposed formulation would not have solved the problem the agency perceived. It would be no easier to determine what is "material" and "substantial" conduct in complex cases as it is to identify "direct" causes and "preparatory" activities. Indeed, oblivious to the inconsistency, the SEC's amicus brief actually *praised* its proposed standard *precisely because* the standard would give courts the "flexibility . . . to address the 'numerous combinations and permutations of, for example, the parties and the types, places, timing and effects of relevant conduct,'" *id.* at 72a (citation omitted)—in other words, because the standard would allow judges to continue to make case-by-case comparisons and fine distinctions. The proposed standard's claimed virtue was that it would still allow the vice. In any event, the agency greatly overstated the degree of "tension" in the Second Circuit's cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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Respondents' brief in opposition to the petition underscores the need for review by this Court. First, Respondents conveniently disregard that the Fifth, Seventh and District of Columbia Circuits have held and the Securities Exchange Commission ("SEC") has found that a fundamental split exists among the circuits in devising and applying the conduct test.

Second, contrary to Respondents' attempts to harmonize the Second Circuit's decision with other circuits, it is clear that Petitioners would have prevailed under the conduct test standards adopted by the Third, Fifth, Seventh, Eighth and Ninth Circuits.

Third, Respondents do not dispute that this Court has *never* addressed the conduct test. Their attempt to analogize this securities case to this Court's authority construing the extraterritorial applicability of the antitrust and patent laws is unavailing.

Fourth, Respondents evade the SEC's conclusion in its Second Circuit amicus brief that the court should exercise subject matter jurisdiction here because of the "material and substantial conduct in furtherance of" the securities fraud that occurred in the United States.[1] App. 49a-50a. In any event, *Petitioners respectfully request that this Court solicit the opinion of the SEC with respect to the issues raised in this petition.*

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1. Notwithstanding Respondents' attempt to soften the alleged allegations of fraud as nothing more than "mistakes" and "estimates", the SEC clearly found that the allegations of the Complaint alleged a legitimate, viable fraud. App. 75a-76a.

1. As their lead argument in opposition to the petition, Respondents posit that "[t]he decision of the court of appeals does not conflict with any decision of another court of appeals." Brief For Respondents In Opposition ("Resp.") 2. However, this argument ignores: (a) the explicit holdings of the Fifth, Seventh and District of Columbia Circuits and the opinion of the SEC that a serious conflict exists among the circuits in applying the conduct test; and (b) the Second Circuit's decision does, in fact, conflict with the holdings of other courts of appeals.

The courts of appeals have acknowledged the split among the circuits. In the words of the Fifth Circuit,, "*[t]he circuits are divided* as to precisely what sort of activities are needed to satisfy the conduct test . . . ." *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997)(emphasis added).

Similarly, the Seventh Circuit has held that "the circuits that have confronted the [conduct test] have articulated a *number of methodologies.*" *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665-66 (7th Cir. 1998)(emphasis added) (analyzing spectrum of holdings, with the District of Columbia Circuit taking the most restrictive approach, the Third, Eighth and Ninth Circuits taking the most permissive approach, and the Second and Fifth Circuits setting a "course between the two *extremes*")(emphasis added).

Finally, Judge Bork in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), analyzed the split among the circuits and observed that "[t]he Second Circuit has set the most *restrictive* standard", *id.* at 303,

while "[t]he Third, Eighth and Ninth Circuits appear to have *relaxed* the Second Circuit's test." *Id.* at 304 (emphasis added).

Put most simply, how can there be "divisions" or "extremes" among the circuits without a clear conflict?

Similarly, the SEC, in its amicus brief submitted in this action at the request of the Second Circuit, also found that there is a significant split among the circuits. App. 55a-56a (citing *Kauthar* and analyzing the distinct and competing conduct test methodologies adopted, respectively, by: (a) the District of Columbia Circuit; (b) the Second, Fifth and Seventh Circuits; and (c) the Third, Eighth and Ninth Circuits).

Commentators also have observed this split. *See, e.g.*, Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Laws: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 17 (2007) (in discussing the effects and conduct tests, the author notes that the "lower federal courts apply in *inconsistent and therefore unpredictable ways* a pair of judicially created jurisdictional tests that are now almost 40 years old") (emphasis added).

This case would permit the Court to resolve the split among the circuits and create a uniform jurisdictional test to guide the lower courts on an issue whose importance grows more patent day by day, as the world economy crumbles and the number of transnational securities fraud claims grows.

2. The decision of the Second Circuit at issue here does conflict with the decisions of other circuits. As Respondents acknowledge, the Second Circuit essentially held that the locus of the alleged *misrepresentation* was critical and determined whether subject matter jurisdiction existed, rather than the locus of the *overall conduct* that comprised the fraud. Resp. 9-10; App. 19a.

This definition of the conduct test now puts the Second Circuit in the camp of Judge Bork's narrow explanation of the conduct test for the District of Columbia Circuit in *Zoelsch*, 824 F.2d at 31 (the domestic conduct at issue must itself constitute a securities violation).

Contrary to Respondents' analysis (Resp. 15-18), the holding of the Second Circuit that the locus of the misrepresentations controls for purposes of the conduct test directly contravenes the holdings reached by the Third, Fifth, Seventh, Eighth and Ninth Circuits. These latter circuits, if they focus on the locus of misrepresentations at all, view the misrepresentations as one factor in context of defendants' overall fraudulent conduct in the United States.

Put differently, the Fifth and Seventh Circuits have adopted a "proximate cause" or "directly caused" conduct test. *See Robinson*, 117 F.3d at 905 (Fifth Circuit adopted "[t]he more restrictive position that the domestic conduct must have been 'of material importance to' or have 'directly caused' the fraud complained of. . ."); *Kauthar*, 149 F.3d at 667 (Seventh Circuit holding that "[w]e believe, therefore, that federal

courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss. . .").[2]

The Third, Eighth and Ninth Circuits have adopted a looser "in furtherance of"/"but for" conduct test. Thus in *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), the Third Circuit held that "[t]he federal securities laws, in our view, do grant jurisdiction in transnational securities cases where at least *some activity* designed to further a fraudulent scheme *occurs* within this country." *Id.* at 114. *See also Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979) (Eighth Circuit adopted identical standard); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (Ninth Circuit adopted identical standard).

Here, the Florida-based individual defendants conceived the fraudulent scheme in Florida, perpetrated the fraud in Florida by manipulating the assumptions in HomeSide Lending's MSR valuation models, generated the fraudulent financials using those models

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2. Older Second Circuit decisions also applied this "directly caused" test. *See, e.g., SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003)(subject matter jurisdiction exists where "the activities or culpable failures to act within the United States 'directly caused' the claimed losses"); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)(same). However, this is irrelevant as there are still at least three competing conduct test rules: (1) the conduct itself must be a violation of the securities laws; (2) the conduct must "proximately cause" the violation; or (3) the conduct must be part of a "but for" chain causing the violation.

and then transmitted that fraudulent data to Australia knowing that it would be ministerially and automatically incorporated into its parent's financials. As the SEC concluded, "the domestic conduct was an integral link in the chain of events to the overseas investors' losses." App. 75a-76a.

Another case dealing with Australia highlights the problem. The Eighth Circuit in *Continental Grain (Austl.) Pty Ltd.* found subject matter jurisdiction under the conduct test because "[e]ven though the ultimate effect . . . was felt in Australia, *the fraudulent scheme of nondisclosure was devised and completed in the United States. Then it was 'exported' to Australia.*" 592 F.2d at 420 (emphasis added). These words describe the instant case exactly. If this Court's role is in no small part is to harmonize federal law so that a federal case in St. Louis with Australian parties is treated the same as a federal case in New York City with Australian parties, then the aforementioned split among the circuits leads to a conflict that warrants this Court's review.

Respondents, in a footnote, argue that alleged Ponzi schemes, such as those run by Madoff and Stanford, "fall well within the scope of the conduct test in any of the circuits". Resp. 17 n.8. However, this simply is not true. For example, assuming that: (a) Madoff, based in New York, used a publicly-traded entity based in Australia as a "feeder fund" that solicited investments for Madoff from Australians, and (b) Australians brought a lawsuit against the Australian entity in New York based on misrepresentations that entity made only in Australia, subject matter jurisdiction would not exist in the Second Circuit because the locus of the

misrepresentations occurred in Australia. The Second Circuit would ignore, as it did in the case below, the salient fact that the case "involved a fraudulent transnational investment scam controlled, masterminded and implemented from New York", Resp. 17 n.8, in the case of Madoff or from Florida in the case of HomeSide Lending. Indeed, *this* case would be even stronger given that the fraudulent conduct in Florida was coupled with the trading of National Australia Bank's American Depository Receipts ("ADRs") on the New York Stock Exchange.[3]

3. Respondents also argue that "[p]etitioners and their amicus make no suggestion that the decision below conflicts with any decision of this Court. . . ." Resp. 20-21. However, this argument misses the central point that *this Court has never addressed the conduct test.* As one commentator noted:

> Considering the stakes involved, one might expect the scope of subject-matter jurisdiction under the federal securities laws would by now be firmly established. Quite the opposite is true. Congress has enacted no legislation on the point, [and] *the Supreme Court has declined to address the question.* . . .

Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Laws: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 17 (2007) (emphasis added; footnote omitted).

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3. Respondents try to ignore the ADRs because there are no surviving plaintiffs who purchased ADRs whereas it remains an important jurisdictional issue to be weighed by the Court and shows the volitional conduct of NAB in the United States.

Respondents attempt to sidestep this crucial fact by citing to two non-securities cases: *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), an antitrust case, and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), a patent case. Neither decision applies to the issues raised in this petition.

Empagran S.A. was founded on the Court's perception that Congress, in enacting the Sherman Act, was primarily concerned with regulating the domestic economy, such that foreign anti-competitive injury wholly separate from any such domestic injury is not redressable under the Sherman Act. 542 U.S. at 165-66. However, the securities laws are concerned not only with cleansing domestic securities markets of fraud, but also, as Judge Friendly held years ago, preventing the exportation of fraud from the United States. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export even when these are peddled only to foreigners"). Application of the Sherman Act to purely foreign economic injury threatens interference with other countries' internal economic policy arrangements that may diverge from American-style capitalism in a way that providing a fraud claim to foreign citizens injured by a fraud formulated and conducted in the United States does not.

In *Microsoft Corp.*, this Court expressed its particular reservations over the worldwide application of the United States patent regime, to the detriment of other countries' patent laws. 550 U.S. at 455. But again, that is a different matter from giving foreign citizens redress in United States courts for fraudulent conduct that occurred in the United States.

4. Respondents attempt to dismiss the SEC's analysis by arguing that the amicus brief was limited to "intra-circuit splits." Resp. 25. This argument ignores two salient facts. First, the SEC did opine on the split among the circuits. App. 55a-56a. Second, the SEC primarily focused on Second Circuit case law in obvious recognition that the Second Circuit "is bound by prior precedent . . . ." App. 55a n.2. For this reason alone, Petitioners respectfully request that the Court seek the views of the SEC on the issues raised by this petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

143

No. 08-1191

In the Supreme Court of the United States

ROBERT MORRISON, ET AL., PETITIONERS

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioners alleged that respondents—an Australian parent company, its wholly-owned Florida-based subsidiary, and individual officials of the two companies—engaged in a transnational securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j. Petitioners further alleged that they suffered injury after the Florida subsidiary provided false accounting figures to the foreign parent, the parent incorporated the false information into its own financial reports and other public statements, petitioners purchased stock in the parent at prices inflated by the misstatements, and the price of petitioners' stock fell when the misstatements were exposed. The question presented is as follows:

Whether the courts below correctly dismissed petitioners' private suit because of the attenuated link between petitioners' alleged injury and the United States component of the alleged fraudulent scheme.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should deny the petition for a writ of certiorari.

STATEMENT

1. This case involves a private suit filed pursuant to Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5. Section 10(b) makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. 78j(b). Rule 10b-5, pro-

mulgated by the Securities and Exchange Commission (SEC or Commission), prohibits various deceptive acts and schemes in connection with the purchase or sale of securities. 17 C.F.R. 240.10b-5.

The Commission is authorized to bring enforcement actions to prevent and punish violations of Section 10(b). See 15 U.S.C. 78u(d)(1) (suits for injunctive relief); 15 U.S.C. 78u(d)(3)(A) (suits for civil penalties). "Though the text of the Securities Exchange Act does not provide for a private cause of action for § 10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768 (2008) (citing *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)). "In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Ibid.* (citing *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005)).

2. Respondent National Australia Bank (NAB) is organized under the laws of Australia and is that country's largest bank. NAB is headquartered in Melbourne, Australia, and its ordinary shares (the Australian equivalent of common stock) trade on the Australian securities exchanges. In 1998, NAB acquired respondent HomeSide Lending, Inc. (HomeSide), located in Jacksonville, Florida. At all times relevant to this case, HomeSide was a wholly-owned subsidiary of NAB. HomeSide was a mortgage service provider, and its principal source of income was the fees that it generated

for servicing mortgages. The present value of those fees was calculated using an internal valuation model and was booked by NAB on its balance sheet as an asset called Mortgage Servicing Rights (MSR). Pet. App. 2a-4a.

Petitioners filed this putative class action on behalf of non-U.S. shareholders of NAB who had purchased stock between April 1, 1999, and September 3, 2001. The complaint alleged that respondents, who include HomeSide, NAB, and individual officers and directors of the two companies, had violated Section 10(b) and Rule 10b-5 by making false and misleading statements that inflated the prices of NAB's securities and caused losses to the class members who had purchased at inflated prices. Pet. App. 4a-5a.

The allegations of securities fraud in this suit stem from the calculation of HomeSide's MSR. The complaint alleged that between 1998 and 2001, HomeSide and its three principal executive officers (respondents Hugh Harris, Kevin Race, and W. Blake Wilson) had deliberately overvalued HomeSide's mortgage portfolio by modifying the various assumptions in the computer data that HomeSide used to produce the MSR valuations. The complaint further alleged that the HomeSide respondents generated the false MSR valuations in the United States and then transmitted those figures to Australia for incorporation into NAB's financials. Petitioners also alleged that the NAB respondents (NAB and its CEO, respondent Frank Cicutto) had learned that HomeSide's MSR valuations were false but had nevertheless incorporated those figures into NAB's own public filings and related public statements. Pet. App. 4a, 9a, 27a-28a.

In July 2001, NAB announced that it would book a charge of $450 million because of a fiscal year writedown of the value of HomeSide's MSR. Following the July writedown, the price of NAB's ordinary shares fell by more than 5%. In September 2001, NAB announced that it would incur a further $1.75 billion writedown. Following the September writedown, the price of NAB's ordinary shares on the Australian market fell by nearly 13%. Petitioners' complaint alleged that they and other class members suffered economic loss as a result of the decline in value of NAB's stock. Pet. App. 3a-4a, 26a-27a.

3. The district court dismissed petitioners' suit, holding that it lacked subject-matter jurisdiction because the alleged fraud had an insufficient connection to the United States. Pet. App. 23a-45a. The court stated that "HomeSide's alleged conduct * * * amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 41a. The court observed that the alleged deceptive conduct of the HomeSide respondents "would be immaterial to [petitioners'] Rule 10b-5 claim but-for (i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad." *Id.* at 41a-42a. The district court concluded that, "[o]n balance, it is the foreign acts—not any domestic ones—that 'directly caused' the alleged harm here." *Id.* at 42a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court identified two principal reasons for its conclusion that the district court lacked subject-matter jurisdiction over petitioners' suit.

a. The court of appeals framed the issue before it as "what conduct comprises the heart of the alleged fraud."

Pet. App. 18a. The court stated that "[t]he actions taken and the actions not taken by NAB in Australia were * * * significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a. The court further observed that "NAB, not HomeSide, is the publicly traded company and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world." *Ibid.*

b. The court of appeals also relied in part on the attenuated connection between any misconduct in the United States and the injury petitioners claimed to have suffered. The court noted "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets" and observed that petitioners seek to represent a class made up entirely "of foreign plaintiffs who purchased on foreign exchanges." Pet. App. 20a. The court also emphasized "the lengthy chain of causation between the American contribution to the misstatements and the harm to investors." *Id.* at 21a. The court noted that petitioners "do not contend that HomeSide sent any falsified numbers directly to investors." *Ibid.* Rather, it explained, "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." *Ibid.*

DISCUSSION

Although the court of appeals erred in treating the question before it as one of "subject matter jurisdiction," the court correctly concluded that petitioners'

private suit could not go forward. And although the courts of appeals have not been entirely uniform in their analysis of Section 10(b)'s application to transnational frauds, petitioners cite no decision indicating that another circuit would have allowed their suit to proceed. The petition therefore should be denied.[1]

A. The Courts Of Appeals Have Consistently And Correctly Held That Section 10(b) Reaches At Least Some Transnational Fraudulent Schemes That Cause Injury Outside The United States

The text of the Exchange Act is silent as to its transnational reach. See *Itoba Ltd.* v. *Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995), cert. denied, 516 U.S. 1044 (1996). In the absence of clear congressional guidance, the courts have attempted "[t]o discern whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to" such transnational securities transactions. *Europe & Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (inter-

[1] Congress is presently considering a legislative proposal that would address the transnational reach of the antifraud provisions of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Exchange Act. On October 15, 2009, Representative Paul Kanjorski, a subcommittee chairman on the House Financial Services Committee, introduced the Investor Protection Act of 2009, H.R. 3817, 111th Cong., 1st Sess. Section 215 of this bill would amend both Acts to provide that the district courts of the United States have jurisdiction over violations of the antifraud provisions that involve a transnational fraud if there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors." The possibility that Congress may address this issue directly in the relatively near future provides an additional reason for this Court to deny the petition.

nal quotation marks and citation omitted), cert. denied, 525 U.S. 1139 (1999). In applying the Exchange Act to different sets of facts involving alleged transnational frauds, courts have relied in large measure on "policy considerations and the courts' best judgment." *Kauthar SDN BHD* v. *Steinberg*, 149 F.3d 659, 664 (7th Cir. 1998), cert. denied, 525 U.S. 1114 (1999).

Respondents rely (Br. in Opp. 21) on the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). That interpretive rule provides a sound basis for concluding that Section 10(b) does not apply when a fraudulent scheme with no effects in the United States is hatched and executed entirely outside this country. But when a scheme to commit securities fraud is executed in part through domestic conduct and in part through conduct occurring outside the United States, that presumption does not identify the type or amount of domestic conduct that will bring the scheme within the reach of Section 10(b).

In particular, the presumption against extraterritorial application of United States law does not suggest that fraudulent conduct for which this country serves as a base of operations will fall outside Section 10(b)'s coverage just because the effects of the fraud are experienced elsewhere. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 371-372 (2005). Even in cases involving foreign victims who suffer harm overseas, courts have been "reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'" *SEC* v.

Kasser, 548 F.2d 109, 116 (3d Cir.), cert. denied, 431 U.S. 938 (1977). In addition, by extending federal securities laws to prohibit fraudulent domestic conduct that injures overseas investors, the United States can reasonably expect other countries to offer comparable protection to American investors. See *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975); see also *Kauthar*, 149 F.3d at 667. The courts have therefore concluded that Section 10(b) can apply not only when fraudulent conduct has effects within the United States, but also when conduct relevant to the fraud occurred in the United States but the effects were experienced abroad. See, *e.g.*, *id.* at 665-666; *Kasser*, 548 F.2d at 116.

B. The Nexus Between A Fraudulent Scheme, A Private Plaintiff, And The United States Is Not Relevant To The Court's Subject-Matter Jurisdiction, But Bears On The Applicability Of Section 10(b)'s Substantive Prohibition And Implied Private Right Of Action

The courts of appeals that have addressed the issue of the transnational reach of Section 10(b) have uniformly described it as one of "subject matter jurisdiction." See, *e.g.*, Pet. App. 22a; *SEC* v. *Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Continental Grain (Austl.) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979) (*Continental Grain*); *Kasser*, 548 F.2d at 116; *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 984 (2d Cir.), cert. denied, 423 U.S. 1018 (1975). This Court's more recent decisions, however, have emphasized the need for greater precision in the use of the term "jurisdiction." See, *e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006); Br. in Opp. 11 n.7. In *Arbaugh*, this Court announced a general rule that "when Congress does not rank a statutory limitation on coverage as jurisdictional,

courts should treat the restriction as nonjurisdictional in character." 546 U.S. at 516.

Jurisdiction over suits alleging violations of the Exchange Act is established by 15 U.S.C. 78aa. That provision states without qualification that the district courts and the courts of United States Territories "shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of *all* suits in equity and actions at law brought to enforce *any* liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. 78aa (emphases added). If a particular suit is otherwise an appropriate means of enforcing a "liability or duty created by" the Exchange Act or rules promulgated thereunder by the Commission, Section 78aa unambiguously vests the district courts with jurisdiction to resolve it. Cf. *Arbaugh*, 546 U.S. at 514-515 (noting that the statutory provisions governing jurisdiction over Title VII suits did not contain any employee-numerosity requirement, and that the numerosity requirement at issue was set forth in a separate provision that did "not speak in jurisdictional terms") (citation omitted).

Thus, under the plain terms of Section 78aa, the geography of an alleged fraudulent scheme—*i.e.*, whether it was conceived and executed in whole or in part outside the United States—is irrelevant to the district court's subject-matter jurisdiction. Rather, that geography is potentially relevant to two *non-jurisdictional* issues bearing on the plaintiff's entitlement to relief. Cf. *Arbaugh*, 546 U.S. at 503 (noting "the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief").

First, the determination whether a fraudulent scheme violates Section 10(b) depends in part on the location of the actions taken to effectuate it. Even if the defendant has engaged in the type of conduct at which Section 10(b) is directed—*i.e.*, the use of a "manipulative or deceptive device or contrivance" "in connection with the purchase or sale of [a] security"—Section 10(b) does not apply if the scheme bears an insufficient connection to the United States.

Second, in a private suit like this one, the transnational character of the scheme and any resulting harms may bear on the availability of Section 10(b)'s private right of action. Plaintiffs who invoke this right of action are always required to prove more than that the defendant violated the statute. Cf. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172 (1994) (*Central Bank*) (identifying, as distinct issues, questions concerning "the scope of conduct prohibited by § 10(b)" and "questions about the elements of the 10b-5 private liability scheme"). In cases involving wholly domestic conduct, a private plaintiff must establish a direct causal link between the defendant's violation and injury to himself. See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988) (holding that "reliance is an element of a Rule 10b-5 cause of action" because it "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury"); p. 2, *supra*. Similarly, in cases involving transnational fraud, the private plaintiff should be required to demonstrate a direct causal link between his injury and the component of the scheme that occurred in the United States. See pp. 13-16, *infra*. In effect, the required nexus in such a suit becomes triangulated: it is not merely between this country and the fraud, but between

this country's part of the fraud and the individual's alleged injury.

In an enforcement action brought by the Commission, by contrast, the transnational character of the fraudulent scheme is relevant *only* to the question whether the defendants' conduct violated Section 10(b). Under the plain terms of the statutory provisions that govern SEC enforcement suits, "[w]henever it shall appear to the Commission that any person has violated any provision of [the Exchange Act], * * * the Commission may bring an action in United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation." 15 U.S.C. 78u(d)(3)(A). The SEC has similarly broad and unqualified authority to bring an action for injunctive relief "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of [the Exchange Act]." 15 U.S.C. 78u(d)(1). Thus, so long as a particular fraudulent scheme bears a sufficient connection to the United States to bring it within Section 10(b)'s substantive prohibition, the Commission may pursue an enforcement action.

C. Although Petitioners Adequately Alleged A Substantive Violation Of Section 10(b), The Link Between The United States Component Of The Scheme And Petitioners' Injury Is Too Attenuated To Support A Private Suit

In holding that petitioners' claims should be dismissed, the court of appeals relied on two distinct rationales. First, the court stated that the issue before it "boils down to what conduct comprises the heart of the alleged fraud," Pet. App. 18a, and concluded that "[t]he

actions taken and the actions not taken by NAB in Australia were * * * significantly more central to the fraud * * * than the manipulation of the numbers in Florida," *id.* at 19a. That analysis, which suggests that the conduct alleged in this case did not violate Section 10(b), is erroneous. In addition, however, the court reasoned that petitioners sued "solely on behalf of foreign plaintiffs who purchased on foreign exchanges," *id.* at 20a, and noted "the lengthy chain of causation between the American contribution to the misstatements and the harm to investors," *id.* at 21a. Those aspects of the case provide a sound basis for concluding that petitioners were not entitled to invoke the implied private right of action under Section 10(b).

1. The increasing integration of the world's securities markets has expanded legitimate investment and capital-raising opportunities, but it has also created an increased potential for novel transnational securities-fraud schemes. As business transactions and fraudulent schemes become more and more internationally dispersed, cases are increasingly likely to arise in which no single country can meaningfully be described as the "heart" of the fraud. See, *e.g.*, *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 372 (S.D.N.Y. 2005). If all countries interpreted their securities laws in accordance with the "heart of the alleged fraud" approach that the Second Circuit articulated here (see Pet. App. 18a), the perpetrators of such schemes could escape accountability in *any* jurisdiction. And even apart from that concern, a "heart of the fraud" approach, which appears to limit Section 10(b)'s coverage to transnational frauds in which domestic conduct predominates, would not adequately protect the government's law enforcement interests. The United States may have a substantial interest

in preventing the use of this country as a location for even a minor part of an international fraud. See *Kasser, supra.*

To address both concerns, Section 10(b)'s coverage should not be limited to transnational frauds in which domestic conduct predominates. Rather, it is sufficient if the scheme involves significant conduct within the United States that is material to the fraud's success. The allegations in petitioners' complaint satisfy that standard. According to those allegations, the false information that was released to the public in Australia was generated in the United States with the expectation that it would be incorporated into NAB's financial statements. The conduct of HomeSide and its officers within the United States thus was not peripheral or merely preparatory, but was an integral component of the overall scheme. Because the scheme had a sufficient connection to the United States to bring it within Section 10(b)'s substantive prohibition, the SEC could have pursued an enforcement action based on the facts alleged in petitioners' complaint. See p. 11, *supra*. To the extent the court of appeals concluded that the scheme as alleged did not violate Section 10(b), its analysis is incorrect.

2. "[B]ecause Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme," crafting the details of the private right of action is of necessity the responsibility of the courts, guided by any available evidence of what restrictions the 1934 Congress would have imposed if it had enacted an express cause of action. *Central Bank*, 511 U.S. at 173. The plaintiff in every private Section 10(b) action must allege certain facts, such as economic loss and a causal

connection between that injury and the defendant's misconduct, that are not elements of a Section 10(b) violation and that the Commission need not prove in its own enforcement actions. See pp. 2, 10-11, *supra*. When a foreign plaintiff in a private Section 10(b) suit alleges that he was injured outside the United States by transnational securities fraud, the plaintiff should be required to prove that his loss resulted not simply from the fraudulent scheme as a whole, but directly from the component of the scheme that occurred in the United States.

"[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Application of substantive federal antifraud provisions to transnational schemes usually will not interfere with comity among different nations because there is broad international consensus regarding the need for such regulation. See 1 Restatement (Third) of Foreign Relations Law § 416 note 3, at 301 (1987) ("United States securities regulation * * * has not resulted in state-to-state conflict."). The Commission, moreover, routinely works with its overseas counterparts to develop coordinated approaches to transnational securities-fraud enforcement. See 15 U.S.C. 78u(a)(2).

Certain aspects of private securities-fraud litigation —*e.g.*, utilization of the fraud-on-the-market theory and the class-action device, both of which are potentially implicated in this case—may, however, create the potential for conflict among nations. See generally Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnation'l L. 14, 61-64 (2007). In addition, other nations might perceive affording a private remedy

to foreign plaintiffs as circumventing the causes of action and remedies (and the limitations thereon) that those nations provide their own defrauded citizens, particularly if the plaintiff's principal grievance appears directed at another foreign entity. Absent indications of a contrary congressional intent, the judicially-created private right of action under Section 10(b) should be tailored so as to minimize the likelihood of such international friction.

In addition, invocation of the Section 10(b) right of action by foreign plaintiffs risks diverting the resources of United States courts to the redress of harms having only an attenuated connection to this country. Requiring a direct causal connection between the foreign plaintiff's injury and the United States component of a transnational scheme alleviates that danger. The Commission, by contrast, is a federal law-enforcement agency that can be expected to take account of national interests (including the national interest in ensuring that this country does not become a safe haven for wrongdoers) when it determines whether particular enforcement suits represent sound uses of its own resources and those of the federal courts.

In this case, the link between HomeSide's alleged false statements and the ultimate harm to petitioners was too indirect to support liability in a private suit. As the court of appeals explained, "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." Pet. App. 21a. In allegedly incorporating the false numbers into NAB's financial reports and other public statements, NAB personnel were not acting under the direction and control of

HomeSide, but rather were exercising independent judgment as officers of HomeSide's parent corporation.[2] Petitioners' allegations thus posit a "lengthy chain of causation between what HomeSide did and the harm to investors," *ibid.*, and that causal chain includes significant intervening events outside this country, including the inflation of the stock price in the Australian trading market. The indirectness of the link between the Florida component of the scheme and petitioners' injuries does not negate the existence of a Section 10(b) violation, but it provides a sound basis for dismissing petitioners' private suit.[3]

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[2] A different analysis might be appropriate if the American mastermind of a transnational fraud scheme directed and controlled subordinates who carried out his instructions abroad. In that context, the actions of the foreign agents could reasonably be attributed to the domestic principal rather than treated as intervening causes of foreign plaintiffs' injuries.

[3] The Commission's amicus brief in the Second Circuit argued that petitioners' allegations in this case were sufficient to survive a motion to dismiss. See Pet. App. 77a. The Commission made clear, however, that its brief was premised on acceptance of existing Second Circuit precedents. See *id.* at 55a n.2. Based on its view that the application of Section 10(b) to transnational frauds involves a question of subject-matter jurisdiction, the Second Circuit had previously held that private suits and SEC enforcement actions alleging such frauds are subject to the same limitations. See *Berger*, 322 F.3d at 193. The Commission in this case therefore had no occasion to discuss the distinct requirements, beyond the need to allege and prove a substantive violation of Section 10(b), that apply to private plaintiffs who invoke the implied right of action.

D. Petitioners Have Identified No Decision Indicating That Another Court Of Appeals Would Have Allowed Their Private Suit To Go Forward

Petitioners contend (Pet. 2-4, 11-14) that the courts of appeals are divided regarding the amount of domestic conduct necessary to proceed on transnational securities-fraud claims in federal court. More specifically, petitioners identify what they contend is a three-way circuit split in which the Third, Eighth, and Ninth Circuits require a "lesser quantum" of conduct; the Second, Fifth and Seventh Circuits "set a mid-course"; and the D.C. Circuit applies "the most restrictive approach." Pet. 12-13 (emphasis and citation omitted). In fact, the differences among the circuits are much less pronounced than petitioners contend. For the most part, the circuits have agreed that private Section 10(b) suits may go forward if conduct within the United States is a "significant" or "substantial" part of the fraudulent scheme and the domestic conduct "directly causes" the plaintiff's injury. And while the approaches of the various courts of appeals have not been entirely uniform, petitioners identify no case indicating that any other circuit would have allowed their suit to go forward.

1. Petitioners' assertion of a circuit conflict rests principally on quotations from two courts of appeals. See Pet. 12; Reply Br. 2-3. The Fifth Circuit has suggested that "[t]he circuits are divided" based on its view that the Third, Eighth, and Ninth Circuits require a "lesser quantum of conduct" than the Second Circuit's standard, which the Fifth Circuit adopted. *Robinson* v. *TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905-906 (5th Cir. 1997). The Seventh Circuit made a similar observation in adopting the Second Circuit's formulation, which requires that an alleged transnational securities fraud

with no domestic effect involve domestic conduct that "directly causes the plaintiff's alleged loss" and constitute more than "merely preparatory" action. *Kauthar*, 149 F.3d at 667; see *id.* at 665-666 (quoting *Robinson* and noting that courts "have articulated a number of methodologies"). Neither opinion, however, identifies a concrete (let alone a frequently recurring) fact pattern in which these circuits would reach conflicting results.

Petitioners emphasize (Pet. 12) the Third Circuit's statement in *Kasser*, 548 F.2d at 114, that a securities-fraud plaintiff must show "at least some [domestic] activity designed to further a fraudulent scheme." Contrary to petitioner's suggestion, however, that statement does not purport to define the *amount* of domestic conduct needed to bring a fraudulent scheme within Section 10(b)'s coverage. *Kasser* itself involved much more than "some" domestic activity. The *Kasser* defendants had "unleash[ed] from this country a pervasive scheme to defraud a foreign corporation": "significant conduct" had occurred in the United States to advance that scheme, and such conduct "was essential to the plan to defraud." *Id.* at 111-112, 114-115.[4] *Kasser*, moreover, was an SEC enforcement action, and the court held that "a district court does have jurisdiction in an SEC suit for injunctive relief under the federal securities laws,

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[4] In *Kasser*, the principal defendant (Kasser) was a United States resident who "largely owned and dominated" the two corporate defendants, one of which was a Delaware corporation. 548 F.2d at 111. Numerous acts "essential" to the fraud—including negotiations with the victim corporation, the execution of a key investment contract, the drafting of other contracts executed abroad, the use of the United States mails and telephones to further the scheme, and the transmittal of fraudulently procured proceeds to and from this country—were performed in the United States. *Id.* at 111, 115.

given circumstances such as are presented here." *Id.* at 112. The court thus had no occasion to consider what distinct limitations might apply to private suits brought by foreign plaintiffs. Cf. pp. 13-16, *supra*.

The Eighth Circuit subsequently concluded that *Kasser* was consistent with its own requirement that "significant conduct" occur in this country as part of a fraudulent scheme. *Continental Grain*, 592 F.2d at 419 (quoting *Kassar*, 548 F.2d 111-112). In holding that the private plaintiffs' suit could go forward, the court in *Continental Grain* endorsed the requirements, drawn from Second Circuit precedents, that the defendant's conduct within the United States must be more than "merely preparatory" and that it must "directly cause the losses." *Id.* at 420 (quoting *Vencap, Ltd.*, 519 F.2d at 1018, and *Bersch*, 519 F.2d at 993). The fraudulent scheme in *Continental Grain* was "devised and completed in the United States": domestic letters and telephone calls ensured that material information would be concealed from a prospective buyer, and the resulting contract with that victim was executed in the United States by a United States citizen-resident and a United States corporation. *Ibid.*; see *id.* at 411-413.

The Ninth Circuit subsequently "adopt[ed] the *Continental Grain* test." *Grunenthal GmbH* v. *Hotz*, 712 F.2d 421, 425 (1983). The court explained that, under that standard, "[t]he conduct in the United States cannot be merely preparatory . . . and must be material, that is, directly cause the losses." *Id.* at 424 (quoting *Continental Grain*, 592 F.2d at 420). The court further concluded that its "[a]ssertion of jurisdiction under the facts of [*Grunenthal*] [wa]s not inconsistent with the approach taken by the Second Circuit." *Id.* at 426. In *Grunenthal*, the pertinent sales contract procured by

fraud was executed in the United States immediately after fraudulent conduct in a face-to-face Los Angeles meeting that directly "induced [the victim] to execute the agreement." *Id.* at 425; see *id.* at 423.

Petitioners, by contrast, allege that they suffered losses on an Australian stock exchange because of fraudulent financial statements prepared in and distributed from Australia by an Australian corporation. In none of the circuits discussed above would this conduct have sufficed to allow petitioners' suit to go forward.

2. In one respect, the decision below appears to impose a standard more demanding than the approaches previously adopted by the Second Circuit and other courts of appeals. By framing the question before it as "what conduct comprises the heart of the alleged fraud," Pet. App. 18a, the court of appeals suggested that Section 10(b) covers only those transnational frauds in which domestic conduct *predominates*. Other courts of appeals, by contrast, have focused on whether conduct within the United States is "significant" or "substantial" rather than "merely preparatory" to the fraud.

In addition to concluding that Australia was the "heart" of the alleged fraud, however, the court of appeals relied on the "lengthy chain of causation between what HomeSide did [in the United States] and the harm to investors." Pet. App. 21a. That aspect of the court's analysis is consistent with decisions of other circuits, which have required private Section 10(b) plaintiffs to show that conduct within the United States "directly" caused their losses. See *Grunenthal*, 712 F.2d at 424 (citation omitted); *Continental Grain*, 592 F.2d at 420 (citation omitted). Petitioners identify no case in which a court of appeals has allowed a private Section 10(b) suit to go forward despite a similarly attenuated link

between the United States component of a fraudulent scheme and the plaintiff's ultimate harm. Because the indirectness of the causal chain in this case provides an independent basis for dismissing petitioners' private suit (see pp. 13-16, *supra*), the apparent inconsistency between the court's "heart of the alleged fraud" analysis and decisions of other courts of appeals does not warrant this Court's review.[5]

3. In *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27 (1987), the D.C. Circuit adopted a "more restrictive test" that requires that a defendant's "domestic conduct comprise all the elements * * * necessary to establish a violation of section 10(b) and Rule 10b-5." *Id.* at 31. The D.C. Circuit's adoption of that standard was based in part on the court's mistaken view that the Second Circuit "seem[ed]" to require that showing. *Ibid.*; see Pet. App. 11a-12a n.6 ("disavow[ing]" *Zoelsch*'s characterization of Second Circuit's jurisprudence); cf. *Zoelsch*, 824 F.2d at 36 (Wald, J., concurring in the judgment) ("find[ing] it unnecessary" to adopt the court's test because the alleged conduct in *Zoelsch* was insufficient "even under the less strict approach adopted by the Third, Eighth, and Ninth Circuits"). *Zoelsch* therefore does reflect a division of authority on the appropriate standard

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[5] The Eleventh Circuit's decision in *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306 (2009), which was issued after the petition for a writ of certiorari was filed in this case, is also consistent with the ruling below. The Eleventh Circuit discussed at some length the court of appeals' decision in this case, and concluded that the facts before it "satisf[ied] the *Morrison* application of the Second Circuit test." *Id.* at 1316 n.11. The court explained in particular that, "in the instant case, and unlike *Morrison*, the Complaint indicates no lengthy chain of causation between the American contribution to the misstatements and the harm to investors. Rather, the causation here was direct and immediate." *Id.* at 1316.

for determining when courts may entertain private Section 10(b) suits alleging transnational securities frauds.[6]

This case, however, would not be a suitable vehicle for resolving that division. Petitioners do not contend that they could prevail under *Zoelsch*'s restrictive test. See Reply Br. 1. Because the court of appeals correctly held that petitioners' suit could not go forward even under the Second Circuit's less demanding approach, the choice between the two standards would not affect the outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The court in *Zoelsch* expressly reserved the question whether a less demanding standard might be appropriate for enforcement suits brought by the Commission than for actions by private plaintiffs. 824 F.3d at 33 n.3; see pp. 10-11, *supra*.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) 7

OTHER AUTHORITIES

Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14 (2007) 4

PriceWaterhouseCoopers, *2008 Securities Litigation Study* (April 1, 2009) 3

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 416 5

BRIEF OF THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Association Of Shareholder And Consumer Attorneys ("NASCAT"), as *amicus curiae*, respectfully urges this Court to grant Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

IDENTIFICATION OF AMICUS CURIAE

NASCAT is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent investors (both institutions and individuals) in securities fraud and shareholder derivative cases throughout the United States. NASCAT has previously filed *amicus curiae* briefs in this Court in cases involving the construction and application of the federal securities laws.[2]

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[1] In accordance with Rule 37.6, counsel for NASCAT represent that they authored this brief in whole and that no person other than the *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

[2] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (NASCAT-AARP); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (AARP-NASCAT-Consumer

(Cont'd)

SUMMARY OF ARGUMENT

The cross-border functioning of financial markets is critical to the success of a global economy. Capital markets are not confined to national borders. The fact that capital markets transcend national boundaries, however, cannot mean that those markets transcend national laws. The United States has a vital interest in ensuring the smooth functioning of global capital markets and, in particular, preserving the integrity of its role in those markets. Moreover, the United States has an interest in ensuring that its securities laws prevent overseas actors from conducting activities within the United States in furtherance of global fraud.

Nearly all courts agree that the antifraud provisions of the United States securities laws apply to at least some transactions that occur even outside of the United States. A split has developed among the United States Circuit Courts of Appeal, however, as to the bounds of federal jurisdiction in class action lawsuits involving transnational securities fraud. This case squarely presents the issue for resolution by the Court.

Resolution of this conflict is highly important. Investors around the world have increasingly turned to the United States securities law to protect their

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(Cont'd)

Federation of America); *S.E.C. v. Zandford*, 535 U.S. 813 (2002) (AARP-NASCAT); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (NASCAT); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993) (NASCAT).

interests. Recent examples of securities class actions predominantly composed of foreign plaintiffs include *Royal Ahold*, *Royal Dutch Shell*, and *Vivendi*, to name just a few. *See, e.g.*, *In re Vivendi Universal S.A. Sec. Litig.*, 241 F.R.D. 213 (S.D.N.Y. 2007); *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004). Further, both domestic and foreign investors look to United States law to protect them both inside and outside of the United States. According to a 2008 Securities Litigation Study issued by PriceWaterhouseCoopers, federal securities law actions against foreign issuers reached an all time high in 2008 and, at the same time, "foreign investors and pension funds continue to seek recovery of losses from US courts by filing claims and participating in US class actions." PriceWaterhouseCoopers, *2008 Securities Litigation Study*, at 48, 55 (April 1, 2009), available at: http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF.

The reach of the United States securities laws has become increasingly important as news stories break almost daily about frauds of international scope, including the recent allegations of massive Ponzi schemes perpetrated by Bernie Madoff and Sir Allen Stanford which have deeply impacted investors worldwide.

The question of the reach of the United States securities law is ripe for resolution. As one commentator observed:

> Considering the stakes involved, one might expect the scope of subject-matter jurisdiction under the federal securities laws would by now be firmly established. Quite the opposite is true. *Congress has enacted no legislation on the point, the Supreme Court has declined to address the question, and lower federal courts apply in inconsistent and therefore unpredictable ways a pair of judicially created jurisdictional tests that are now almost 40 years old.*

Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 17 (2007) (emphasis added; footnote omitted).

Financial markets are well-served by accountability and predictability. This case will allow the Court to timely resolve a split among the circuits which undermines both.

ARGUMENT

A. A Three-Way Split Has Developed Among The Circuits

The Securities Exchange Act of 1934 (the "Exchange Act") is silent as to its extraterritorial application. Courts have recognized, however, that subject matter jurisdiction under the Exchange Act may extend to claims involving transnational securities frauds. *See, e.g., SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). There are generally two tests employed to determine the reach of the antifraud provisions of the Exchange Act: the "effects test" and the "conduct test." *See Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)

The "effects test" focuses on the situs of the effects of fraud. The effects test examines whether fraud which takes place abroad impacts shares registered on a national securities exchange and is detrimental to the interests of American investors. *Itoba*, 54 F.3d at 124.

The "conduct test" examines the situs of the conduct giving rise to fraud. The conduct test examines whether the conduct related to a securities transaction occurs predominantly within the United States even though the transaction takes place outside the United States. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 416(1)(d) (1987).

> "The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out

> the alleged fraudulent scheme, on the theory that Congress did not want 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'"

Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983) (*quoting IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975)). The conduct test is directly at issue in this case.

A three-way split has developed among the Circuits as to the proper scope of jurisdiction under the Exchange Act where conduct within the United States results in fraud in connection with a transaction outside the United States. "The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resulting harm to justify the application of American securities law." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998).

The Third, Eighth and Ninth Circuits have held that jurisdiction may be exercised when conduct within the United States furthered the alleged fraud. *See S.E.C. v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (holding that jurisdiction exists "where at least some activity designed to further a fraudulent scheme occurs within this country."); *Cont'l Grain (Austl.) Pty. Ltd. v. Poe Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) ("where defendants' conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment, . . . the district court

has subject matter jurisdiction."); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (adopting "the test used by the Third and Eighth Circuits" because it "advances the policies underlying federal securities laws.").

The Second, Fifth and Seventh Circuits have established a more restrictive test, holding that jurisdiction may be exercised only when conduct occurring within the United States directly caused the alleged losses. *Psimenos*, 722 F.2d at 1046 ("where conduct within the United States directly caused the loss . . . a district court have jurisdiction over suits by foreigners who have lost money through sales abroad.") (internal quotations omitted); *Robinson v. TCI/US W. Commc'ns., Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (adopting the Second Circuit test); *Kauthar SDN BHD*, 149 F.3d at 667 (jurisdiction is appropriate when "conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success.").

Finally, the District of Columbia Circuit has adopted the most stringent test, holding that jurisdiction is proper only "when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and directly cause the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) (internal quotations omitted).

B. This Court Should Grant The Petition For Writ of Certiorari In Order To Resolve The Split

In its amicus brief submitted to the Second Circuit in this case, the Securities and Exchange Commission ("SEC") noted that the issue of jurisdiction for transnational fraud was in need of greater clarity.[3] Because of tension in the law, district courts have "largely resorted to engaging in case-by-case comparison of the specific fact patterns to those of existing Circuit precedent." *See* Appendix at 49a.

Both the SEC and NASCAT are dedicated to the protection of investors. Resolution of this jurisdictional issue will eliminate uncertainty which impacts this goal in the case of transnational fraud. There is no reason why a transnational fraud should be subject to jurisdiction under the Exchange Act in New Jersey but not New York.

Moreover, the Court should ensure that the United States not "be used as a base for effectuating the fraudulent conduct of foreign companies." *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. Ill. 1984) (citations omitted). The United States has a critical interest in ensuring the integrity of its participation in global capital markets.

The current economic crisis will undoubtedly result in the continued uncovering of frauds, like the alleged Madoff and Stanford Ponzi schemes, where both the

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[3] The SEC's amicus brief submitted to the Second Circuit is attached as Appendix C to the Petition for Writ of Certiorari.

conduct and the effects occur around the world. This case presents an opportunity for the Court to clarify the reach of the United States securities laws at a time when many similar cases are at their inception. Without such clarification, the law will be subject to continued uncertainty and inconsistency.

CONCLUSION

For all of the foregoing reasons, NASCAT respectfully submits that the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
JAN 19 2010
OFFICE OF THE CLERK

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 23, 2009
CERTIORARI GRANTED NOVEMBER 30, 2009

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Appendix D — Affidavit Of Robert W. Berliner Dated April 12, 2004 ..... 104a

Appendix E — Affidavit Of Bella Borg Brenner Dated April 9, 2004 ..... 117a

The following documents have been omitted in printing this Joint Appendix because they appear in the Appendix of the Petition for a Writ of Certiorari on the following pages:

Opinion Of The United States Court Of Appeals For The Second Circuit Decided October 23, 2008 ..... 1a

Order Of The United States District Court For The Southern District Of New York Dated October 25, 2006 ..... 23a

Brief Of The Securities And Exchange Commission As *Amicus Curiae* In Response To The Court's Request Of The United States Court Of Appeals For The Second Circuit Dated September 17, 2008 ..... 46a

Relevant Statute 15 U.S.C.A. § 78j 78a

Relevant Code 17 C.F.R. § 240.10b-5 ..... 80a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

General Docket
US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 07-0583-cv

Nsuit : 3850 STATUTES-Secur Comm Exchange

In Re: National Australia Bank Securities v.
Filed 2/16/07

Appeal from: SDNY (NEW YORK CITY)

Case type information:

Civil
Private
None

Lower court information:

District: 03-cv-6537
Trial Judge: Barbara S. Jones
MagJudge:
Date Filed: 08/28/03
Date order/judgement: 1/16/2007
Date NOA filed: 2/13/2007

Fee status: Paid

Appendix A

Panel Assignment:

Panel: JON GC BDP 500 Pearl

Date of decision: 10/23/08

Prior cases: NONE

Current cases: NONE

Official Caption 1/

INDIV

DISPOSED

Docket No. [s] : 07-0583 -cv

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[LD ret]

Norman Hauge
Plaintiff
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[LD ret]

Robert Morrison
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[LD ret]

Appendix A

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Docket as of December 31, 2009 1:32 am Page 5

INDIV

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Docket as of December 31, 2009 1:32 am Page 6

INDIV

DISPOSED

2/16/07	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Brian Silverlock, Norman Hauge, Robert Morrison, Russell Owen, filed. [Entry date Feb 23 2007] [JC]

* * *

5/2/07	APPELLANT Brian Silverlock, Robert Morrison, Russell Owen; APPELLEE Geraldine Silverlock, brief w/special appendix FILED with proof of service. [Entry date May 9 2007] [JC]

Appendix A

5/2/07	APPELLANT Brian Silverlock, Robert Morrison, Russell Owen; APPELLEE Geraldine Silverlock, joint appendix (vol. 1 of 3) filed w/pfs. [Entry date May 9 2007] [JC]
5/2/07	APPELLANT Brian Silverlock, Robert Morrison, Russell Owen; APPELLEE Geraldine Silverlock, joint appendix (vol. 2 of 3) filed w/pfs. [Entry date May 9 2007] [JC]
5/2/07	APPELLANT Brian Silverlock, Robert Morrison, Russell Owen; APPELLEE Geraldine Silverlock, joint appendix (vol. 3 of 3) filed w/pfs. [Entry date May 9 2007] [JC]

* * *

7/2/07	APPELLEE Hugh Harris, Kevin Race, W. Wilson, brief filed with proof of service. [Entry date Jul 3 2007] [JC]
7/2/07	APPELLEE Frank Cicutto, National National Australia Bank Ltd., brief filed with proof of service. [Entry date Jul 11 2007] [JC]

* * *

Appendix A

7/2/07	APPELLEE Homeside Lending, brief filed with proof of service. [Entry date Jul 11 2007] [JC]
	* * *
7/12/07	AMICUS CURIAE Securities Industry, brief received. [Entry date Jul 13 2007] [JC]
	* * *
7/12/07	AMICUS CURIAE Washington Legal Foundation, brief filed with proof of service. [Entry date Jul 17 2007] [JC]
	* * *
7/12/07	AMICUS CURIAE Securities Industry, brief filed with proof of service. [Entry date Jul 19 2007] [JC]
7/12/07	Amicus Curiae Securities Industry motion to file brief as amicus curiae filed with proof of service. [Entry date Jul 13 2007] [JC]
7/13/07	Amicus Curiae Association of Corporate Counsel motion to file brief as amicus curiae filed with proof of service. [Entry date Jul 17 2007] [JC]

Appendix A

7/17/07	Notice to counsel in re: Motion order filed 7/17/07 [Entry date Jul 18 2007] [JC]
7/17/07	Order FILED REFERRING motion for leave to file brief as amicus curiae by Amicus Curiae Association of Corporate Counsel to merits panel, endorsed on motion dated 7/13/2007 [Entry date Jul 18 2007] [JC]
7/17/07	Order FILED GRANTING motion to file brief as amicus curiae by Amicus Curiae Securities Industry, endorsed on motion dated 7/13/2007 [Entry date Jul 18 2007] [JC]
7/18/07	Notice to counsel in re: Motion order filed 7/17/07 [Entry date Jul 18 2007] [JC]
7/30/07	APPELLANT Brian Silverlock, Robert Morrison, Russell Owen; reply brief filed with proof of service. [Entry date Aug 9 2007] [JC]

* * *

11/5/07	APPELLEE Frank Cicutto, National National Australia Bank Ltd., 28(J) letter received. [Entry date Nov 9 2007] [AM]

* * *

Appendix A

11/13/07	Letter received James W. Johnson, Esq. for Appellant Brian Silverlock in response to Appellee National National Australia Bank Ltd., 28(J) letter. [Entry date Nov 14 2007] [AM]
	* * *
2/5/08	APPELLEES Hugh Harris, Kevin Race and W. Wilson, 28(J) letter received. [Entry date Feb 6 2008] [TM]
2/7/08	Letter dated 2/6/08 submitted by Thomas A. Dibbs in response to to the submission of defendants-appellees Harris, Race, Williams & Homeside lending, Inc., received. (cc Calendar) [Entry date Feb 11 2008] [KR]
2/7/08	APPELLEE Homeside Lending, Frank Cicutto, National National Australia Bank Ltd., 28(J) letter received. (cc Calendar) [Entry date Feb 11 2008] [KR]
4/17/08	APPELLEE Hugh Harris, Kevin Race, W. Wilson, 28(J) letter received. [Entry date Apr 24 2008] [YS]
	* * *
6/3/08	Set for argument on 7/18/08 [Entry date Jun 3 2008] [SC]

Appendix A

* * *

6/9/08	AMICUS CURIAE Association of Corporate Counsel, brief filed with proof of service. [Entry date Jun 10 2008] [AG]
6/9/08	Order FILED GRANTING motion for leave to file brief as amicus curiae by Amicus Curiae Association of Corporate Counsel, endorsed on motion dated 7/13/2007. [Entry date Jun 10 2008] [AG]
6/10/08	Notice to counsel issued regarding order filed June 9, 2008 which GRANTED motion by Association of Corporate Counsel for leave to file brief as amicus curiae. Movant has been emailed a copy of said order. [Entry date Jun 10 2008] [AG]

* * *

7/16/08	Order filed stating: "There is currently a case before the Second Circuit, In Re National Asutralia Bank Securities Litigation, No. 07-0583-cv, that poses some difficult questions regarding whether we have jurisdiction over possible violations of SEC regulations in light of concerns of extraterritoriality. We invite the views of the SEC on both the broader questions posed by this case and the case itself. Because of

time concerns, if the SEC submits its views, we would like them to be delivered to the court within 3 weeks of your receiving this." (FP) [Entry date Jul 16 2008] [AV]

7/16/08 Notice to counsel re: Order dated 7/16/08. [Entry date Jul 16 2008] [AV]

7/18/08 Case heard before: NEWMAN, CALABRESI, PARKER, C.JJ. (CD Date 7/18/08) [Entry date Jul 18 2008] [DC]

* * *

8/5/08 Letter dated 8/5/08 received from Jacob H. Stillman, Esq., in re: request additional six weeks extension to September 17, 2008 on submitting its views of the Securities and Exchange Commission. [Entry date Aug 5 2008] [ML]

8/6/08 Order filed stating: "The Securities and Exchange Commission's August 5, 2008 request for an extention until September 17, 2008 to submit their views, if any, regarding In re National Australia Bank Sec. Litig., No. 07-0583-cv is GRANTED. While the SEC does have until September 17, 2008 to submit its view, we strongly encourage an early submission prior to the date". (before: JON, GC, BDP, C.J.J.; by: FP) [Entry date Aug 6 2008] [ML]

Appendix A

8/6/08	Notice to counsel in re: Order filed 8/6/08. [Entry date Aug 6 2008] [ML]
9/18/08	AMICUS CURIAE Securities and Exchange Commission, brief filed with proof of service. [Entry date Sep 19 2008] [ML]
9/24/08	APPELLEE Homeside Lending, Frank Cicutto, National National Australia Bank Ltd., supplemental brief RECEIVED. [Entry date Sep 25 2008] [ML]
9/24/08	Appellee National National Australia Bank Ltd., Appellee Homeside Lending, Appellee Frank Cicutto motion for leave to file supplemental brief in response to SEC Amicus brief filed with proof of service. [Entry date Sep 25 2008] [ML]
9/29/08	Notice to counsel in re: Order filed 9/29/08. [Entry date Sep 29 2008] [ML]
9/29/08	APPELLEE National National Australia Bank Ltd., et al., supplemental brief in response to the brief amicus curiae of the securities and exchange commission filed with proof of service. [Entry date Sep 29 2008] [ML]

Appendix A

9/29/08	Order FILED GRANTING motion to file supplemental brief by Appellee Homeside Lending, Appellee National National Australia Bank Ltd., Appellee Frank Cicutto, endorsed on motion dated 9/24/2008. JON, GC, BDP, C.JJ (JP) [Entry date Sep 29 2008] [ML]
10/23/08	Judgment of the district court is AFFIRMED by published signed opinion filed. (BDP) [Entry date Oct 23 2008] [AM]
10/23/08	Judgment filed. [Entry date Oct 23 2008] [AM]
10/23/08	Notice to counsel in re: Opinion filed 10/23/08. [Entry date Oct 23 2008] [AM]
11/4/08	Errata sheet re: opinion decided 10/23/08, filed. [Entry date Nov 4 2008] [ML]
11/4/08	Notice to counsel in re: errata filed 11/4/08. [Entry date Nov 4 2008] [ML]
11/14/08	Judgment MANDATE ISSUED. CLOSED [Entry date Nov 14 2008] [ML]
11/14/08	Notice to counsel in re: Mandate issued 11/14/08. [Entry date Nov 14 2008] [ML]

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03-cv-06537-BSJ

In re: National Australia Bank Securities Litigation
Assigned to: Judge Barbara S. Jones
Demand: $0
Member case: *(View Member Case)*
Related Case: *1:03-cv-08046-BSJ*
Cause: 15:78m(a) Securities Exchange Act

Date Filed: 08/28/2003
Date Terminated: 01/16/2007
Jury Demand: Plaintiff
Nature of Suit: 850 Securities/Commodities
Jurisdiction: Federal Question

Lead Plaintiff

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Appendix B

Date Filed	#	Docket Text
08/28/2003	1	CLASS ACTION COMPLAINT filed. Summons issued and Notice pursuant to 28 U.S.C. 636(c). FILING FEE $ 150.00 RECEIPT # 483696. (jjm) (Entered: 08/29/2003)
		* * *
09/23/2003	4	STIPULATION and ORDER, defendants' time to answer, move to dismiss or otherwise respond to the complaint shall be extended to 45 days after the entry of an order appointing lead plaintiff and approving lead counsel pursuant to 15 USC 78u-4(a)(3), and that, if, before the expiration ofsuch period, plaintiffs file an amended complaint, defendants shall have until 45 days after such filing to answer, move to dismiss, or otherwise respond to such amended complaint. (signed by Judge Barbara S. Jones) (kw) (Entered: 09/24/2003)
		* * *
11/03/2003	11	NOTICE OF MOTION (FILED IN SERVICE DATE) by Australian Ordinary, American ADR for an order pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934, 15 USC

78u-4(a)(3), and Rule 42 of the FRCP, to consolidate the related cases , to appoint movant Australian Ordinary, movant American ADR to serve as lead plaintiff(s), to approve the selection of Goodkind Labaton Rudoff & Sucharow LLP as lead counsel for the class. Proposed order attached. Return Date not indicated. (moc) (Entered: 11/05/2003)

11/03/2003 12 MEMORANDUM OF LAW by Australian Ordinary, American ADR in support of [11-1] motion for an order pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934, 15 USC 78u-4(a)(3), and Rule 42 of the FRCP, to consolidate the related cases, [11-2] motion to appoint movant Australian Ordinary, movant American ADR to serve as lead plaintiff(s), [11-3] motion to approve the selection of Goodkind Labaton Rudoff & Sucharow LLP as lead counsel for the class. (moc) (Entered: 11/05/2003)

11/03/2003 13 DECLARATION of Thomas A. Dubbs by Australian Ordinary, American ADR in support Re: [11-1] motion for an order pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934, 15 USC 78u-4(a)(3), and Rule 42 of the FRCP, to consolidate the related cases, [11-2]

motion to appoint movant Australian Ordinary, movant American ADR to serve as lead plaintiff(s), [11-3] motion to approve the selection of Goodkind Labaton Rudoff & Sucharow LLP as lead counsel for the class. (moc) (Entered: 11/05/2003)

* * *

11/25/2003 15 ENDORSED LETTER addressed to Magistrate Judge Andrew J. Peck from George T. Conway, III dated 11/17/03 re: counsel for defendants National Australia Bank, Ltd., HomeSide Lending, Inc. and Frank J. Cicutto request to join in the motion for consolidation. The discussed stipulation is to be finalized & submitted to my Chambers by 12/5/03. The parties are to meet and confer and file a proposed Rule 26(f) discovery (and other events) plan, taking into account this Court's "Rocket Docket" approach. The Rule 26(f) plan is due no later than 12/5/03. If counsel would like a conference to discuss the plan, please contact my secretary to schedule it.(Signed by Judge Andrew J. Peck on 11/24/03) Copies Faxed by Chambers.(db,) (Entered: 12/02/2003)

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12/03/2003	17	STIPULATION AND ORDER: that actions 03cv6537(BSJ) (AJP) and 03cv8046(AJP) are hereby consolidated for pretrial proceedings before this Court. The Consolidated Action shall be captioned: "In re National Australia Bank Securities Litigation." All related actions that are subsequently filed in, or transferred to, this District shall be consolidated into the Consolidated Action for pretrial Purposes. This Order shall apply to every such related action, absent order of the Court; this Order is without prejudge to the rights of any party to apply for severance of any claims or action, for good cause shown; the docket in 03cv6538 (BSJ)(AJP) shall constitute the Master Docket in this action; the following persons are appointed Lead Plaintiff: Robert Morrison, Russell Leslie Owen and Brian and Geraldine Silverlock; Counsel Goodkind Labaton Rudoff & Scharow LLP shall manage the prosecution of this Consolidated Action to avoid duplicative or unproductive activities; Lead Plaintiff shall file a consolidated complaint within 30 days after the Court enters the order designating the Lead Plaintiffs and Lead Plaintiffs Counsel, unless otherwise agreed by the parties; dft?s shall respond to the consolidated

complaint within 45 days after service. unless otherwise agreed upon by the parties (Signed by Judge Andrew J. Peck on 12/1/03) (pl,) (Entered: 12/15/2003)

* * *

01/07/2004 25 AMENDED STIPULATION AND ORDER, pursuant to FRCP 42(a), consolidating cases 03cv6537(BSJ)(AJP) as Lead Case with 03cv8046(BSJ)(AJP) as Member Case for all purposes, and shall be captioned: "In re: National Australia Bank Securities Litigation." When Lead Plaintiff determines that a subsequently filed case should be consolidated herewith, they will so advise the Court. The Court appoints the following persons as Lead Plaintiffs: Robert Morrison, Russell Leslie Owen and Brian and Geraldine Silverlock. (Signed by Judge Andrew J. Peck on 1/5/04). Copies Faxed By Chambers.(tp,) (Entered: 01/21/2004)

* * *

01/30/2004 27 CONSOLIDATED CLASS ACTION COMPLAINT against all defendants. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock.(cd,) (Entered: 02/03/2004)

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* * *

03/11/2004 29 MOTION (FILED ON SERVICE DATE) for an order prus to FRCP 12(b)(1) dismissing all claims asserted against HomeSide by purchasers of securities tht were traded on foreign exchanges; and purs to FRCP 9(b) and 12(b)(6), dismissing plaintiffs' claims against Homeside under Section 10(b) and Rule 10b-5 for failure to state a claim upon which relief may be granted; Document filed by Homeside Lending, Inc.. (djc,) (Entered: 03/12/2004)

03/11/2004 30 MEMORANDUM OF LAW in Support re: 29 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Homeside Lending, Inc.. (djc,) (Entered: 03/12/2004)

03/11/2004 31 MOTION (FILED ON SERVICE DATE) for an Order to Dismiss. Document filed by Hugh Harris, Kevin Race, W. Blake Wilson. (jco,) (Entered: 03/15/2004)

03/11/2004 32 MEMORANDUM OF LAW in Support re: 31 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Hugh Harris, Kevin Race, W. Blake Wilson. (jco,) (Entered: 03/15/2004)

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03/11/2004 33 NOTICE OF MOTION (FILED ON SERVICE DATE) to Dismiss all claims asserted by lead pltffs Robert Leslie Owen and Brian and Geraldine Silverlock and all other purchasers of Nat. Australia Bank securities on foreign exchanges, for lack of subject matter jurisdiction . . . dismissing all claims of all pltffs for failure to state a claim upon which relief may be granted..failure to plead fraud with particularity and failure to comply with the pleading standards..dismissing all claims asserted by lead pltff Robert Morrison for failure to state a claim upon which relief may be granted . . . answering papers be served no later than thirty days after service of this motion, . . . reply papers be served no later than twenty-one days after service of any answering papers. by Frank Cicutto and National Australia Bank (nite dep. box)(pa,) (Entered: 03/17/2004)

* * *

03/11 004 35 DECLARATION of Nicki Papadopoulos in Support re: 33 MOTION (FILED ON SERVICE DATE) to Dismiss.(nite dep. box). Document filed by Frank Cicutto, National Australia Bank Ltd. (pa,) (Entered: 03/17/2004)

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03/11/2004 36 MEMORANDUM OF LAW in Support re: 33 MOTION (FILED ON SERVICE DATE) to Dismiss. (nite dep. box). Document filed by Frank Cicutto, National Australia Bank Ltd. (pa,) (Entered: 03/17/2004)

04/12/2004 37 MEMORANDUM OF LAW in Opposition re: 31 MOTION (FILED ON SERVICE DATE) to Dismiss., 33 MOTION (FILED ON SERVICE DATE) to Dismiss., 29 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock. (kw,) (Entered: 04/13/2004)

04/12/2004 38 DECLARATION of James W. Johnson in Opposition re: 31 MOTION (FILED ON SERVICE DATE) to Dismiss., 33 MOTION (FILED ON SERVICE DATE) to Dismiss., 29 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock. (kw,) (Entered: 04/13/2004)

04/12/2004 39 AFFIDAVIT of Robert W. Berliner in Support re: 38 Declaration in Opposition to Motion, 37 Memorandum

of Law in Oppisition to Motion,. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock. (kw,) (Entered: 04/13/2004)

04/12/2004 40 Certification of Bella Borg Brenner. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock. (kw,) (Entered: 04/13/2004)

05/03/2004 41 REPLY MEMORANDUM OF LAW in Support re: 31 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Hugh Harris, Kevin Race, W. Blake Wilson. (cd,) (Entered: 05/04/2004)

05/03/2004 42 REPLY MEMORANDUM OF LAW in Support re: 33 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Frank Cicutto, National Australia Bank Ltd. (jco,) (Entered: 05/04/2004)

05/03/2004 43 REPLY MEMORANDUM OF LAW in Support re: 29 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Homeside Lending, Inc. (jco,) (Entered: 05/04/2004)

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05/03/2004	44	REPLY AFFIDAVIT of Robert S. Loigman in Support re: 29 MOTION (FILED ON SERVICE DATE) to Dismiss. (jco,) (Entered: 05/04/2004)
05/03/2004	45	SUPPLEMENTAL TRANSMITTAL DECLARATION of George T. Conway III in Support re: 33 MOTION (FILED ON SERVICE DATE) to Dismiss. (jco,) (Entered: 05/04/2004)

* * *

06/23/2004	47	MEMORANDUM OF LAW in Support re: 33 MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by Frank Cicutto, National Australia Bank Ltd. (kw,) (Entered: 06/24/2004)

* * *

10/26/2006	49	ORDER: For the reasons explained in parts I and II, supra, no named plaintiff remains in this action. Accordingly, the Complaint is dismissed. Plaintiffs' counsel, however, is granted leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only. (Signed by Judge Barbara S. Jones on 10/25/06) (js,) (Entered: 10/26/2006)

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11/03/2006	50	TRANSCRIPT of proceedings held on 10/31/06 before Judge Barbara S. Jones. (tro,) (Entered: 11/03/2006)
11/13/2006	51	ORDER: Accordingly, the Court's October 26th order is clarified, and otherwise modified, to provide leave to file an amended complaint with a substitute lead domestic plaintiff within 60 days of that order, i.e. by December 26, 2006 (the sixtieth day being a holiday). cf. fed.R.Civ.p. 54(b) (court order is subject to revision at any time before the entry of judgment adjudicating all claims . . . of all the parties.) If no such complaint is filed, the Court's October 26th order shall become final, and I will direct that final judgment in this case be entered. (Signed by Judge Barbara S. Jones on 11/8/06) (js,) (Entered: 11/13/2006)
11/29/2006	52	ORDER; that after reviewing the parties' submission, the Court reserves decision at this time concerning whether to direct entry of the final judgment, under F.R.C.P. 54(b), with respect to that portion of the Court's 10/26/06 Order dismissing the Lead Foreign Plaintiffs' claims for lack of subject matter jurisdiction. (Signed by Judge Barbara S. Jones on 11/15/06) (pl,) (Entered: 11/30/2006)

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12/26/2006	53	AMENDED CONSOLIDATED CLASS ACTION COMPLAINT amending 27 Complaint against National Australia Bank Ltd., Homeside Lending, Inc., Frank Cicutto, Hugh Harris, Kevin Race, W. Blake Wilson.Document filed by Norman Hauge, Robert Morrison, Maria Kennedy, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock, Harvard B. Kolm. Related document: 27 Complaint filed by Robert Morrison,, Russell Leslie Owen,, Brian Silverlock,, Geraldine Silverlock,.(djc,) (Entered: 12/29/2006)
01/02/2007	56	MEMORANDUM OF LAW in Opposition to defendants' Motion to Dismiss the Amended Consolidated Class Action Complaint. Document filed by Norman Hauge. (jar,) (Entered: 01/10/2007)
01/02/2007	57	DECLARATION of Candace Preston in Support re: 56 Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Consolidated Class Action Complaint. [received in the night deposit box on 1/2/2007 at 4:13pm.] Document filed by Norman Hauge. Filed In Associated Cases: 1:03-cv-06537-BSJ,1:03-cv-08046-BSJ(jar,) (Entered: 01/10/2007)

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01/04/2007	54	ORDER; the Court is in receipt of Plaintff's amended consolidated class action complaint, dated December 26, 2006, as well as Defense counsel's letter, dated December 28, 2006, calling for the dismissal of the amended complaint. The Court construes Defendant's letter as a motion, and directs Plaintiff's counsel to respond in writing by close of business on Tuesday, January 2, 2007. (Signed by Judge Barbara S. Jones on 12/29/06) (djc,) (Entered: 01/04/2007)
01/08/2007	55	ORDER; defense counsel is granted leave to submit a written reply by close of business on Friday, 1/5/2007. (Signed by Judge Barbara S. Jones on 1/3/07) (kco,) (Entered: 01/08/2007)
01/08/2007		Set Deadlines: Replies due by 1/5/2007. (kco,) (Entered: 01/08/2007)
01/08/2007	61	DECLARATION of Candace Preston in Support of Lead Plaintiff Norman J. Hauge's Opposition to Defendants' Motion to Dismiss the Amended Consolidated Class Action Complaint. Document filed by Norman Hauge. (djc) (Entered: 01/23/2007)
01/11/2007	58	ORDER; that on 1/9/07, the parties stipulated and agreed to dismiss the

amended complaint with prejudice, which the Court so Order. There being no remaining issues for the Court to decide, the Clerk of the Court is directed to enter a final judgment in this matter. (Signed by Judge Barbara S. Jones on 1/10/07) (pl,) (Entered: 01/11/2007)

01/11/2007 Transmission to Judgments and Orders Clerk. Transmitted re: 58 Order,, to the Judgments and Orders Clerk. (Entered: 01/11/2007)

01/11/2007 59 STIPULATION AND ORDER; that pursuant to F.R.C.P. 41(a)(1) the claims set forth in the Amended Complaint on behalf of plaintiff Norman J. Hauge against dfts are hereby dismissed with prejudice with each party to bear its own cost. The parties request that the Court enter final judgment dismissing the original complaint and all claims of the Foreign Purchasers and the Lead Domestic Plaintiff asserted therein for the reasons stated in the Court?s Order dated 10/25/06. (Signed by Judge Barbara S. Jones on 1/9/07) (pl,) (Entered: 01/11/2007)

01/11/2007		Transmission to Judgments and Orders Clerk. Transmitted re: 59 Stipulation and Order, to the Judgments and Orders Clerk. (pl,) (Entered: 01/11/2007)
01/16/2007	60	CLERK'S JUDGMENT That for the reasons stated in the Court's Order dated January 10, 2007, the amended complaint is dismissed with prejudice. (Signed by J. Michael McMahon, clerk on 1/12/07) (ml) (Entered: 01/16/2007)
02/13/2007	62	NOTICE OF APPEAL from 60 Clerk's Judgment, 49 Order. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock. Filing fee $ 455.00, receipt number E 605627. Copies mailed to attorney(s) of record: Watchtell, Lipton, Rosen & Katz; Friedman Kaplan Seiler & Adelman, LLP; A. Graham Allen. (tp) (Entered: 02/14/2007)
02/14/2007		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 62 Notice of Appeal. (tp) (Entered: 02/14/2007)
02/14/2007		Transmission of Notice of Appeal to the District Judge re: 62 Notice of Appeal. (tp) (Entered: 02/14/2007)

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03/22/2007	63	LETTER addressed to Judge Barbara S. Jones from George T. Conway III dated 3/16/07 re: dft's write to request that the Court direct the Clerk's office to file the letters that the parties submitted to the Court concerning the amended omplaint filed on 12/26/06, so that the record on appeal will be complete. Document filed by National Australia Bank Ltd.(pl) (Entered: 03/22/2007)
03/22/2007	64	LETTER addressed to Judge Barbara S. Jones from James W. Johnson dated 12/26/07 re: the counsel for Lead Plaintff writes to the Court re; that pursuant to paragraph 1(E) of the Court's Individual Practices, enclosed please find a courtesy copy fo the Amended Consolidated Class Action Complaint, which was filed with the Clerk of the Court today.. Document filed by Robert Morrison, Russell Leslie Owen, Brian Silverlock, Geraldine Silverlock.(pl) (Entered: 03/22/2007)
03/22/2007	65	LETTER addressed to Judge Barbara S. Jones from George T. Conway III dated 12/28/07 re: response to the letter sent to the Court on 12/26/06 by plaintiffs' counsel and the proposed Second Amended Complaint enclosed

with that letter. Document filed by National Australia Bank Ltd., Frank Cicutto.(pl) (Entered: 03/22/2007)

03/22/2007 66 LETTER addressed to Judge Barbara S. Jones from David M. Murphy dated 1/5/07 re: plaintiffs should not be allowed to proceed on the Second Amended Complaint, and final judgment should be entered in favor of dfts.. Document filed by National Australia Bank Ltd., Frank Cicutto.(pl) (Entered: 03/22/2007)

03/22/2007 67 AFFIDAVIT of David M. Murphy in connection with this captioned matter, and affidavit on personal knowledge. Document filed by National Australia Bank Ltd., Frank Cicutto. (pl) (Entered: 03/22/2007)

03/22/2007 68 Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for 62 Notice of Appeal, filed by Geraldine Silverlock, Russell Leslie Owen, Brian Silverlock, Robert Morrison USCA Case Number 07-0583-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (nd) Additional attachment(s) added on 5/22/2007 (Lee, Michael). (Entered: 03/23/2007)

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03/30/2007	*69*	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 62 Notice of Appeal, filed by Geraldine Silverlock, Russell Leslie Owen, Brian Silverlock, Robert Morrison USCA Case Number 07-0583, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (nd) Additional attachment(s) added on 4/11/2007 (Thomas, Dave). (Entered: 03/30/2007)
11/17/2008	*70*	MANDATE of USCA (Certified Copy) as to 62 Notice of Appeal, filed by Geraldine Silverlock, Russell Leslie Owen, Brian Silverlock, Robert Morrison USCA Case Number 07-0583-cv. Ordered, Adjudged and Decreed that the judgment of the District Court is AFFIRMED in accordance with the opinion of this court. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 11/14/2008. (nd) (Entered: 11/17/2008)
11/17/2008		Transmission of USCA Mandate/Order to the District Judge re: *70* USCA Mandate,. (nd) (Entered: 11/17/2008)

* * * *

APPENDIX C — CONSOLIDATED CLASS ACTION COMPLAINT DATED JANUARY 30, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. 03 Civ. 6537 (BSJ) (AJP)

JURY TRIAL DEMANDED

In re NATIONAL AUSTRALIA BANK SECURITIES LITIGATION

CONSOLIDATED CLASS ACTION COMPLAINT

Lead Plaintiffs Russell Leslie Owen, Brian and Geraldine Silverlock, and Robert Morrison, individually and on behalf of all other persons similarly situated, by their undersigned attorneys, for their Consolidated Class Action Complaint, allege upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, based upon, *inter alia*, the investigation made by and through their attorneys, which investigation included, among other things, a review of the public documents, Securities and Exchange Commission ("SEC") filings, Australian Securities and Investments Commission ("ASIC") filings, analyst reports, news releases and media reports of National Australia Bank, Ltd. ("NAB" or the "Company"), as follows:

Appendix C

NATURE OF THE ACTION

1. This is a securities fraud class action brought on behalf of all purchasers of all equity, debt, and other securities of NAB including, but not limited to, its ordinary shares and American Depository Receipts ("ADRs") between April 1, 1999 and September 3, 2001, inclusive (the "Class Period"), seeking to pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t. This action involves the dissemination of materially false and misleading statements during the Class Period concerning fraud by NAB at its subsidiary, HomeSide Lending, Inc. ("HomeSide").

2. HomeSide was a mortgage service provider, servicing some two million customers, with a service portfolio exceeding $180 billion in 2001.

3. As a result of NAB's conduct in connection with HomeSide's financial modeling on its $180 billion mortgage servicing portfolio, NAB's subsidiary HomeSide knowingly used unreasonably optimistic valuation assumptions or methodologies since at least the beginning of the Class Period. These unreasonably optimistic assumptions or methodologies brought HomeSide's and NAB's profitability to a crashing halt on September 3, 2001 when NAB announced that it would write off $1.75 billion due to problems at HomeSide. During the Class Period the Company's ADR price plummeted from an intra-day high of over $92.40 ($174.09 Australian) on August 24, 2001 to an

intra-day low of $78.40 ($150.40 Australian) per share on September 4, 2001.[1]

JURISDICTION AND VENUE

4. The claims alleged herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder by the Securities and Exchange Commission ("SEC").

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

6. Venue is proper in this District, pursuant to Section 27 of the Exchange Act, and 28 U.S.C. § 1391(b). NAB has an office in this District, which is located at 200 Park Avenue, 34th Floor, New York, New York. In addition, HomeSide did business in this District during the Class Period.

7. In connection with the acts, transactions and conduct alleged herein, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the United States mails, interstate telephone communications and the facilities of a national securities exchange and market.

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1. As of August 27, 2003, one Australian dollar equaled approximately 64 U.S. cents.

Appendix C

THE PARTIES

8. Lead Plaintiff Russell Leslie Owen purchased 4,000 shares of NAB securities on June 7, 2001.

9. Lead Plaintiffs Brian and Geraldine Silverlock purchased 118 shares of NAB securities on July 25, 2001.

10. Lead Plaintiff Robert Morrison purchased 125 shares of NAB securities on August 11, 2000.

11. Defendant NAB is a corporate entity organized under the laws of Australia. NAB is headquartered in Melbourne, Australia. NAB is Australia's largest bank. Its ordinary shares trade in efficient markets on the Australian securities exchanges and its ADRs trade on the New York Stock Exchange ("NYSE"). In addition to ownership of HomeSide, NAB has extensive operations in the United States, including, during the Class Period, operations in New York and Michigan, in addition to the HomeSide's operations in Jacksonville, Florida.

12. Defendant HomeSide was at all relevant times a corporation headquartered in Jacksonville, Florida. During the Class Period, HomeSide was a mortgage service provider servicing in excess of two million loans, in return for a fee. After the stunning revelation of the $1.75 billion write-off, NAB sold HomeSide to Washington Mutual, Inc.

13. Defendant Frank Cicutto ("Cicutto") was, at all relevant times, NAB's Managing Director and Chief Executive Officer. Prior to holding those positions, he was NAB's Executive Director, Chief Operating Officer and the Executive General Manager. He has also held various positions at NAB since 1968.

14. Defendant Hugh Harris ("Harris") was, at all relevant times, HomeSide's Chief Executive Officer, until his "resignation" on September 4, 2001. He had served as its Chief Executive Officer since April 1999. He also served as President and Chief Operating Officer of HomeSide from January 1993 to April 1999. From January 1988 to January 1993, he was Vice. Chairman of HomeSide in charge of production and secondary marketing. Since March 1996, he was also President, Chief Operating Officer and a Director of HomeSide International, Inc.

15. Defendant Kevin Race ("Race") was, at all relevant times, HomeSide's Chief Operating Officer, until his "resignation" on September 4, 2001. He had been its President and Chief Operating Officer since April 1999. He was also its Executive Vice President and Chief Financial Officer from October 1996 to April 1999 and was the Vice President of HomeSide International, Inc. since October 1996.

16. Defendant W. Blake Wilson ("Wilson") was, at all relevant times, HomeSide's Chief Financial Officer, Executive Vice President and Director of Capital Markets until his "resignation" on September 4, 2001.

He had been its Chief Financial Officer since April 1999 and its Executive Vice President and Director of Capital Markets since September 1997. Previously, he was HomeSide's Senior Vice President and Director of Capital Markets since June 1996.

17. Defendants Cicutto, Harris, Race and Wilson are collectively referred to as the "Individual Defendants".

18. Because of the Individual Defendants' position with NAB and/or HomeSide, they had access to the adverse undisclosed information about HomeSide's financial condition, modeling methodologies and computer systems.

19. The Individual Defendants also controlled the content of NAB's and/or HomeSide's press releases, corporate reports, SEC filings, ASIC filings, and communications with analysts. By concealing HomeSide's adverse financial performance, the Individual Defendants were able to meet earning targets and thereby reap significant bonus compensation during the Class Period.

20. It is appropriate to treat the Individual Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in the Company's public filings, press releases and other publications as alleged herein are the collective actions of the narrowly defined group of defendants identified above.

21. Each of the above officers and directors of NAB and HomeSide, by virtue of their high-level positions, directly participated in the management of HomeSide, was directly involved in the day-to-day operations of HomeSide at the highest levels and was privy to confidential proprietary information concerning NAB's and HomeSide's operations, business, growth, and financial prospects, as alleged herein. Said Individual Defendants were directly involved in or responsible for HomeSide's financial condition, computer modeling and computer systems and the false and misleading public statements and released information related to HomeSide's financial condition as alleged herein. At all times during the Class Period, the Individual Defendants were aware or recklessly disregarded that the false and misleading statements were being issued regarding the Company, and the Individual Defendants approved or ratified these statements, in violation of the federal securities laws.

22. As an officer and controlling person of a publicly held company whose ordinary shares are traded on the Australian Stock Exchange ("ASX") and London Stock Exchange ("LSE"), among others, and whose ADRs were, and are, registered with the SEC pursuant to the Exchange Act, traded on the NYSE, and governed by the provisions of the federal securities laws, Defendant Cicutto had a duty to disseminate promptly, accurate and truthful information with respect to the Company's business, markets, growth, and present and future business prospects, and to correct any previously issued statements that had become materially misleading or

untrue, so that the market price of the Company's ordinary shares and ADRs would be based upon truthful and accurate information. The Individual Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations.

23. The Individual Defendants participated in the drafting, preparation, and/or approval of the various public, shareholder and investor reports and other communications complained of herein and were aware of, or recklessly disregarded, the misstatements contained therein and omissions therefrom, and were aware of their materially false and misleading nature. Because of their executive and managerial positions with NAB and HomeSide, respectively, each of the Individual Defendants had access to the undisclosed information about HomeSide's true grave financial condition and performance as particularized herein, and knew (or recklessly disregarded) that adverse facts rendered the positive representations made by or about HomeSide and its business issued or adopted by NAB materially false and misleading.

24. The Individual Defendants, because of their positions of control and authority as officers of NAB and HomeSide, respectively, were able to and did control the content of the various SEC filings, press releases and other public statements pertaining to the NAB during the Class Period. The Individual Defendants were provided with copies of the documents alleged herein to be misleading prior to or shortly after their issuance

and/or had the ability and/or opportunity to prevent their issuance or cause them to be corrected. Accordingly, the Individual Defendants are responsible for the accuracy of the public reports and releases detailed herein and are therefore primarily liable for the representations contained therein.

25. Each of the defendants is liable as a participant in a fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of NAB ordinary shares and ADRs by disseminating materially false and misleading statements.

CLASS ACTION ALLEGATIONS

26. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a Class, consisting of all persons who purchased of all publicly traded equity and debt securities of NAB, including, but not limited to, its ordinary shares and ADRs on the open market during the Class Period and who were damaged thereby. Excluded from the Class are defendants, the officers and directors of the Company, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

27. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, NAB ordinary shares were actively traded. As of October 22, 1999, there were more than 1.48 billion

ordinary shares and 3.254 million ADRs (representing 16.273 million ordinary shares) of NAB issued and outstanding. While the precise number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, there were over 300,000 ordinary shareholders holding of record or beneficially during the Class Period, and, as of October 22, 1999, the ADRs were held by 200 holders with registered addresses in the United States, and likely hundreds more, if not thousands, of beneficial holders of the ADRs in the proposed Class. Record owners and other members of the Class may be identified from records maintained by NAB or its transfer agent and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in securities class actions.

28. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether the federal securities laws were violated by defendants' acts as alleged herein;

(b) whether statements made by defendants to the investing public during the Class Period misrepresented material facts about the status of HomeSide's financial condition;

(c) the true business, operations and likely foreseeable near-term future growth and prospects for the Company in light of the programs at HomeSide;

(d) whether statements made by defendants to the investing public during the Class Period misrepresented material facts about the status of NAB's financial condition; and

(e) to what extent the members of the Class have sustained damages and the proper measure of damages.

29. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by defendants' wrongful conduct in violation of federal law that is complained of herein.

30. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class and securities litigation.

31. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

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FACTUAL ALLEGATIONS

NAB Needed Foreign Expansion to Grow

32. NAB, Australia's largest bank, with 50,000 employees globally and more than 12 million customers around the world, has aspired to become a global financial institution.

33. In order to achieve its goals, NAB was compelled to look outside of its domestic market as its primary area of growth, as Australia has a population of only around 20 million people.

34. According to its annual report for the year ended September 30, 1999 ("1999 Annual Report"), in 1999 NAB was the largest financial institution in Australia and the third largest company in Australia by stock market capitalization. In its report, NAB highlighted its global expansion, noting that:

> The geographic diversity of the National's operations does more than reduce the risk of being dependent on one market. Our international operations create economies of scale and a customer base that, in aggregate, are well above the ability of any one bank to achieve in a market the size of Australia.

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35. NAB also made the point in the 1999 Annual Report that:

> In 1999, half of the Group's profit came from our international operations. The key international regions, Europe, New Zealand and the United States all increased their profit contribution. The benefits of recent international acquisitions, such as the United States based HomeSide International, Inc., a mortgage origination and service operation, go beyond the addition of revenues and profits in the near term. These businesses fit within the National's overall growth strategy and provide key benefits in sustaining shareholder value.

36. Another "important element of [NAB's] strategy and a key feature of the National's success in recent years has been its ability to reduce its dependency on interest income." This reduction, the 1999 Annual Report stated, was the result of NAB's efforts to increase its involvement in businesses, such as HomeSide, that have substantial fee income potential. Indeed in 1999, "the National earned nearly 43% of its income from non-interest sources such as fees from mortgage servicing in the United States, treasury income and fees from the marketing of a variety of innovative financial services products."

37. As of December 2000, NAB was the largest custodian in Australia with total assets under custody

and administration of $180 billion Australian. As was again openly conceded. by NAB in December 2000: "The size of our domestic [Australian] market effectively set limits on the ability of companies to grow within Australia."

38. Indeed, by the year 2000, NAB Chairman Rayner boasted that more than 45% of NAB's assets and revenues were outside Australia and, that based on profitability, NAB was one of the 25 largest banks in the world.

39. Rayner reinforced NAB's growth philosophy when he stated on December 14, 2000 at NAB's annual general meeting that: "The bottom line is that only companies of adequate size will attract core capital of the major long term investors. So growth is important."

40. NAB also continued to tout its rapid growth in income from non-interest services such as mortgage servicing. Indeed, Defendant Cicutto boasted that in 2000 more than 50% of NAB's revenues came from non-interest sources, compared to 35% five years earlier, and that 40% of these non-interest income sources did not exist five years ago. This represented a "marked transformation of NAB" according to Cicutto.

41. NAB could hardly hope to realize its ambition to be an international financial services company without an active and expanding presence in the United States.

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42. Indeed, HomeSide was critical to NAB's presence in the United States, or at least the perception of that commitment, particularly after NAB announced the sale of its other significant U.S. business, Michigan National Corporation, for approximately $5.3 billion Australian in November 2000.

43. In addition to growing internationally, at its December 14, 2000 annual general meeting, Defendant Cicutto touted another NAB "core strategy": its e-business's strategy.

44. That e-business strategy was designed "to improve the efficiency of [it's] . . . manufacturing, processing and administration."

45. Thus, HomeSide was critical to NAB for four reasons. First, it bolstered NAB's United States presence (particularly after the sale of Michigan National Corporation). Second, it was an important step in NAB's international growth strategy. Third, it would purport to be a showcase for NAB's e-business strategy based upon the processing and administrative efficiency created by online commerce and systems. Fourth, it at least initially appeared to support Cicutto's boast of the growth of non-interest sources of income for NAB.

46. Unfortunately for NAB's security holders, NAB directed and touted HomeSide' s operation to fulfill the perception of NAB's growth, even though NAB knew, or was severely reckless in not knowing, that HomeSide's success under NAB was an illusion.

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HomeSide's Business

47. NAB acquired HomeSide on February 11, 1998, for $1.22 billion from the Thomas H. Lee Company, Madison Dearborn Partners and strategic partners BankBoston Corporation and Barnett Bank.

48. HomeSide was a mortgage service provider, servicing in 2001 in excess of two million loans, in return for a fee.

49. These fees represented a source of future income for HomeSide (and NAB), the present value of which was calculated using valuation models and then booked by NAB on its balance sheet as an asset known as Mortgage Servicing Rights ("MSR").

50. The value of the MSR was amortized over their expected life.

51. The drivers for increasing profitability in a mortgage servicing business are increasing originations and the number of loans serviced, and doing so with administrative efficiency so that fees increase.

52. NAB, anxious to portray itself as a growing international integrated financial company, drastically increased HomeSide's mortgage servicing portfolio by acquiring portfolios from other mortgage servicing companies.

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53. Based on NAB's strategy of growing HomeSide by acquisitions, by March 2000 HomeSide's mortgage servicing portfolio had grown to approximately $188 billion, making HomeSide the sixth largest mortgage servicer in the United States.

54. Early repayments on mortgages affect the value of MSR because they shorten the life over which the mortgage servicer receives fees on loans which it services.

55. Accordingly, HomeSide, like other mortgage servicers, hedged against the risk of early repayment.

56. To analyze the effect of early repayment, its likelihood and the impact upon MSR, HomeSide utilized software systems, including one known as MIAC Analytics that was developed by Mortgage Industry Advisory Company ("MIAC") based in New York City.

57. However, as alleged below, NAB and HomeSide manipulated these financial models in order to falsely portray HomeSide as successful based on artificially inflated MSR values. This artificially inflated asset was then improperly consolidated into the financial statements of NAB.

Defendants' Scheme And Wrongful Course Of Conduct

57. On or about April 1, 1999, *Mortgage Banking* published an article concerning HomeSide's lending practices in connection with its mortgage business in

the United States (the "Mortgage Banking Article"). The Mortgage Banking Article reported the following false and misleading information:

> In the third quarter of 1998, HomeSide Lending, Inc., Jacksonville, Florida, made some changes in the hedges covering its $120 billion servicing portfolio that positioned it well for the liquidity crisis in the third quarter, according to Kevin Race, chief financial officer.
>
> HomeSide, like other servicers that hedge, found its hedges outperformed expectations, while asset values for the mortgage servicing rights did not go down as fast because mortgage rates did not fall as far and fast as Treasuries. In fact, Race says, HomeSide's hedge outpaced the decline in servicing rights by 10 percent.
>
> Race has found that the fourth quarter of 1998 and early 1999 have presented HomeSide and other mortgage bankers with "a challenging environment" for hedging. "A lot of people are struggling. As asset values [of mortgage servicing rights] are going up, hedges are going down faster."
>
> HomeSide has also seen "a slight underperformance" of its hedge program, as the mortgage-Treasury spread has tightened, Race says. "We believed that mortgage

> spreads were wide and would tighten. We didn't anticipate how they would bounce around, particularly [in January]," he says.
>
> Most servicers now are balancing the need to protect the servicing asset with the need to keep down the cost of managing the hedge, Race says. The big question now, he says, is: "How do I create a sufficient level of protection at the lowest implied cost?" (Emphasis added)

59. In fact, HomeSide was poorly positioned due to the manipulation of its mortgage portfolio modeling, as explained herein and at paragraphs 115 through 149. NAB and the Individual Defendants knew of this manipulation or were severely reckless in not knowing of it at the time these statements were made.

60. On April 15, 1999, *The Florida Times Union* reported on promotions at HomeSide (the "Florida Times Union Article"). The Florida Times Union Article reported that Defendant Harris, a longtime friend of HomeSide's Chairman Joe Pickett, had been promoted to Chief Executive Officer of HomeSide and Defendant Race had moved into Harris' old job of President and Chief Operating Officer. The Florida Times Union Article also reported Defendant Blake would be promoted to Chief Financial Officer. The Florida Times Union Article reported Pickett as saying the "appointments of Hugh, Kevin and Blake position HomeSide to move forward with its strategy for domestic growth and global expansion."

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61. On May 20, 1999, *American Banker* published an article concerning rising interest rates in the United States and the resulting toll on the mortgage business. The article reported a dramatic decline in housing starts in April 1999 and a sharp drop in mortgage applications the previous week. According to the *American Banker*, economists had stated the market was "bound to cool off at least somewhat from 1998's unusually robust level as [interest] rates rose".

62. However, the *American Banker* article also quoted Defendant Race as misleadingly saying that HomeSide was "insulated from a downturn because it does not have retail branches and gets most of its mortgages from brokers, correspondents; and banks that agree to sell HomeSide all their loans." Defendant Race was also quoted in the American Banker Article as saying;

> That's the trade-off we made. We did not see some of the boom in terms of origination volumes that some of the retail-oriented players did the last year-and-a-half. By the same token, we are not going to have the issues to deal with in terms of layoffs and fixed-cost structure going into this part of the cycle.
>
> If we had spent a lot of money on bricks and mortar and had radically expanded the staff for the last couple of years, we would probably be pretty nervous right now. You will start to see some announced layoffs in the

next 60 to 90 days that are substantial in some retail shops.

63. In truth, HomeSide was far from insulated. It's mortgage portfolio was extremely vulnerable due to the artificial manipulation of its portfolio modeling, as explained herein and at paragraphs 115 through 149. NAB and the Individual Defendants knew of this manipulation or were severely reckless in not knowing of it at the time this statement was made.

64. On June 16, 1999, *The Wall Street Journal* reported that HomeSide had agreed to acquire as much as $7 billion of servicing assets annually during a five-year period from Cendant Corporation's mortgage unit (the "Cendant Purchase"). *The Wall Street Journal* reported HomeSide had purchased and would service $7 billion of Cendant Mortgage's portfolio, which represented about 60,000 loans.

65. On June 21, 1999, *Mortgage Marketplace* reported on HomeSide's Cendant Purchase. Defendant Harris, CEO of HomeSide said of the Cendant Purchase, "Our real strategy for the last few years is to continue growing our servicing portfolio. With our preferred partner, we're not only getting a servicing portfolio, but we're getting a flow production for a period of time."

66. On June 29, 1999, NAB issued over $1 billion in National Income Securities ("NIS") securities, which are stapled securities made up of one fully paid note issued by NAB through its New York branch and one unpaid Preference Share also issued by NAB.

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67. On July 22, 1999, NAB reported that HomeSide had contributed $37 million to NAB's profit for the period ended June 30, 1999. NAB's July 22, 1999 press release, in commenting on NAB's results, stated:

> Mr. Cicutto said the pleasing features of the latest results included the strong growth in lending and the continued increase in non interest income.
>
> Mr. Cicutto also noted the progress of the Group's global wholesale financial services business and the rapid development of its product specialists such as HomeSide and other financial services.
>
> "Looking ahead, we will continue to focus on diversification of our business and the capturing of the benefits of our global structure."
>
> "The National is well placed to take advantage of the positive economic and financial environment in most of the markets in which we operate," Mr. Cicutto said.

68. In fact, however, the above statements were false and misleading at the time they were made because HomeSide would not have been a contributor to the Group's profits, non interest income or global services had its mortgage portfolio not been knowingly manipulated, as explained herein and at paragraphs 115

through 149, to generate unrealistically high financial results. NAB and the Individual Defendants knew of these problems or were severely reckless in not knowing of these problems at the time these statements were made. Far from rapid development, HomeSide was heading out of control.

69. On or about November 4, 1999, NAB issued a press release announcing "a record Group operating profit of $2,821 million [Australian] for the year to 30 September 1999." This was purportedly an increase of 12.3% on the previous year's results. HomeSide's first year contribution of allegedly $153 million Australian to NAB's profit was cited as a highlight of the results.

70. The press release also reported that Defendant Cicutto was pleased with the past year's results. In touting NAB's success, particularly with regard to HomeSide, Defendant Cicutto stated:

> [w]e made considerable progress with a number of key strategic initiatives such as the implementation of our global business model, the integration of HomeSide and the acceleration of our e-commerce program.... [E]ach of these individual successes are indicative of the confidence with which the Group has pursued its Australian and global ambitions.

71. The November 4, 1999 statements were false and misleading at the time they was made. As explained

herein and at paragraphs 115 through 149, HomeSide's positive results were due to its mortgage portfolio being artificially overvalued. This was known to defendants or they were severely reckless in not knowing about the manipulation. Also, far from becoming integrated, NAB knew at the time, or was reckless in not knowing, that HomeSide's business was careening off track.

72. Similarly, in its annual report for the fiscal year ended September 30, 1999, NAB misleadingly touted HomeSide's contribution to its global business and shareholder value. NAB stated that a key factor in its 12.3% increase in operating profit after tax (before abnormal items) was an increase in its other operating income resulting, in part, from the addition of HomeSide. NAB stated that in its "debut year" HomeSide contributed $312 million Australian in mortgage servicing fees in 1999 and $153 million Australian to NAB's consolidated profits. These results were erroneously attributed to HomeSide's "first full year with [NAB] and strong volume growth."

73. In the 1999 annual report, NAB also misleadingly stated:

> as interest rates and yield curves change over time the bank may be exposed to a loss in earnings due to the effects of interest rates on the structure of the balance sheet. Sensitivity to interest rates arises from mismatches in the re-pricing dates, cash flows and other characteristics of the assets and

> their corresponding liability funding. These mismatches are actively managed as part of the overall interest rate risk management process which is conducted in accordance with Group Balance Sheet Management policy and guidelines. In managing the structural interest rate risk, the primary objectives are to limit the extent to which net interest income could be impacted from an adverse movement in interest rates and to maximise [sic] shareholder wealth.

74. The statements in NAB's 1999 Annual Report were false and misleading at the time they were made, because NAB failed to disclose that in fact, as explained herein and at paragraphs 115 through 149, HomeSide's positive results were due to its mortgage portfolio being artificially overvalued. This was known to defendants or they were severely reckless in not knowing about the manipulation.

75. On or about May 4, 2000, NAB issued a press release announcing "a record half-yearly result. The Group's operating profit after tax of $1,573 million [Australian] for the six months to 31 March 2000 was 13.2 percent higher than the $1,390 million earned in the March 1999 first half . . ." Other operating income, which included HomeSide's mortgage servicing fees, was purportedly $2,475 million—an increase of 9.8%. Earnings from NAB's international operations allegedly increased 16.6%, representing almost 50% of NAB's after tax profit. Specifically, the press release stated that

profits from the United States had increased to $265 million Australian and that, "[t]he current result includes a solid contribution from Michigan National Corporation, higher profits from HomeSide and interest income attributable to the issue of National Income Securities in June 1999."

76. The press release also reported that Defendant Cicutto "commented that the current result confirms the depth and diversity of the Group's earnings streams and its ability to adapt to sustained competition and varying economic conditions." Specifically he stated:

> During the latest six months we have seen continued strong growth in lending activity, fee based services and tight containment of costs. The latest performance is satisfying, considering the broad range of strategic activities the Group has undertaken during the past six months.
>
> The National has completed a major review of its corporate strategy, restructured its operations and is close to finalizing the major acquisition of MLC Limited. The ability to both manage this necessary transformation and continue to achieve record profits is a testimony to the overall quality of the Group. Looking ahead, we are confident of our prospects.

77. The above statements regarding NAB's six month results ended March 31, 1000 were false and misleading when made. Defendants were attempting to portray HomeSide (and the diversified opportunities it represented for NAB) as thriving and growing when in fact at the time, as explained herein and at paragraphs 115 through 149, its portfolio was significantly and artificially overvalued and this manipulation was known to defendants or they were severely reckless in not knowing about the manipulation.

78. On May 22, 2000, *Australian Financial Review* published an article concerning the impact of HomeSide's earnings on NAB (the "May 2000 Australian Financial Review Article"). The May 2000 Australian Financial Review Article reported that although HomeSide continued to fall short of earnings expectations, it remained a potential driver of long-term growth within NAB. The article also reported that in 1998 and 1999, HomeSide contributed $153 million Australian to NAB's $2.82 billion Australian profit.

79. On July 27, 2000, NAB issued a press release concerning its results for its third fiscal quarter ended June 30, 2000 (the "July 27, 2000 Press Release"), reporting a quarterly profit after tax of $829 million Australian—an increase of 18.9% over the June 1999 quarter. In commenting on NAB's performance, Defendant Cicutto stated that the result was solid particularly given that it was achieved against a backdrop of difficult trading conditions for HomeSide in the United States.

80. Defendant Cicutto also stated:

> the Group has once again demonstrated its fundamental strength and its capacity to generate sound performance, whilst moving forward on several strategic fronts . . . . HomeSide has announced a strategic alliance with Fannie Mae that will reshape the market for on-line mortgage origination in the United States . . . . We continued to gain benefits from our geographic diversity . . . .

81. The above statements regarding NAB's third fiscal quarter ended June 30, 2000 were false and misleading when made as a result of the material omission of any mention of the manipulated portfolio modeling, as explained herein and at paragraphs 115 through 149, and the attendant consequences of that overvaluation. This manipulation was known to defendants or they were severely reckless in not knowing about the manipulation.

82. On November 2, 2000, NAB announced its results for the fiscal year ended September 30, 2000. For that period NAB announced a "record" profit of $3,377 million Australian, of which 47.3% was generated outside Australia. In the press release, NAB stated that the highlights of the results included, among other things, that non interest income from mortgage activities and other fee generating business rose 43% from 1999. and that, "HomeSide continued to expand its operations in the United States and announced a

strategic alliance with Fannie for the on-line origination of mortgages throughout the United States."

83. Furthermore, in the November 2, 2000 press release, Defendant Cicutto stated, "A priority during the year ahead will be to fully leverage the strengths and potential of our Northern Hemisphere assets." This statement was false and misleading at the time it was made as applied to HomeSide.

84. According to NAB's Form 20-F filed with the SEC, also for the year ended September 30, 2000, HomeSide purportedly contributed a profit after tax (and before abnormal items) of $141 million Australian and $535 million Australian to NAB's operating income, which allegedly increased 43% in 2000. HomeSide's contribution was said to have been generated by its mortgage servicing fees, which purportedly increased 71.5% because of "an increase in the servicing portfolio due to higher volumes from strategic alliances entered into during 1999."

85. The above statements regarding NAB's fiscal year ended September 2000 were false and misleading when made. Defendants were attempting to portray HomeSide (and the geographic diversity it represented for NAB) as thriving and growing when in fact at the time, as explained herein and at paragraphs 115 through 149, its portfolio was significantly and artificially overvalued and this manipulation was known to defendants or they were severely reckless in not knowing about the manipulation.

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86. On or about November 17, 2000, NAB filed its Form 6-K for the month ended November 2000. In that filing NAB stated that "HomeSide's after-tax profit was adversely affected by the impact of lower mortgage production volumes, higher interest rates and pricing competition." The description of HomeSide's activities during this period was false and misleading as a result of the material omission of any mention of its manipulated portfolio modeling and the attendant consequences of that overvaluation.

87. On January 5, 2001, *Australasian Business Intelligence* reported that NAB was to issue $1.1 billion in mortgage-backed securities. The securities were to be registered in the United States and sold to European and United States investors in a move by NAB to diversify its funding sources. On January 5, 2001, NAB's head of group capital management, Chris Matten, said the move would increase available capital by $70 million Australian.

88. On January 22, 2001, the *Australian Financial Review* published an article concerning HomeSide's impact on NAB's finances. The *Australian Financial Review* reported:

> National Australia Bank profits are expected to receive a fillip this year from its struggling US mortgage business HomeSide. A spike in refinancing activity prompted by recent US interest rate cuts is expected to revitalise HomeSide's origination business, which

> suffered a 55 per cent fall in revenue last year. The division is expected to deliver at least a further [A]$50 million in profits on top of the 5.5 per cent HomeSide contributed to NAB's consolidated profit last year. Credit Suisse First Boston has upgraded its earnings outlook for NAB, arguing that HomeSide is well leveraged to exploit a fresh wave of refinancing in the US mortgage market. The broker now expects NAB to post a net profit of more than [A]$3.8 billion this year, which would represent a 12.8 per cent improvement on the 2000 result of [A]$3.37 billion.

89. On March 16, 2001, the *Mortgage Servicing News* reported that HomeSide and NAB had completed their first global mortgage securitization. The *Mortgage Servicing News* article reported the following:

> Jacksonville, FL — HomeSide International and National Australia Bank have reported that they have priced and completed their first global mortgage-backed securitization, which company officials say was met with "substantial investor interest."
>
> Class "A" notes totaling $1.059 billion were priced at the three-month London interbank offered rate plus 19 basis points and sold to investors in the United States, Europe and Asia through lead managers National Australia Bank (London branch), Deutsche Bank and JP Morgan.

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> Class "B" notes totaling 20 million Australian dollars (about $10.9 million) were offered to Australian investors and priced at the three month bank bill swap rate plus 52 basis points through National Australia Securities Ltd. as the sole dealer for the issue.

90. On May 10, 2001, NAB announced its results for the sixth months to March 31, 2001. For that period NAB announced a "strong" 28.7% increase in net profit after tax to $4,025 million Australian. In the press release, Defendant Cicutto stated, "This is a strong result that confirms our position as a leading, diversified financial services group. It also demonstrates that our strategies are working. The national's unique combination of business and geographic diversity is delivering profits and providing significant growth opportunities."

91. With respect to HomeSide, the press release also reported (in pertinent part):

> HomeSide's contribution fell to $71 million after tax from $84 million, however this represents an improvement on the September 2000 half contribution of $48 million. The improvement is due to a 9.7% increase in profit from the US operations, which reflects the recent recovery of production volumes in the US due to falling mortgage interest rates, the development of the Australian business, and the impact of the weaker Australian dollar. . . .

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> Our internet-based home loan business, HomeSide Solutions, has written US$500 million of new business since last November.

92. The above statements regarding NAB's half year results for 2001 were false and misleading when made as a result of the material omission of any mention of the manipulated portfolio modeling, as explained herein and at paragraphs 115 through 149, and the attendant consequences. of that overvaluation. This manipulation was known to defendants or they were severely reckless in not knowing about the manipulation.

93. On June 4, 2001, the *Australian Financial Review* published an article reporting on NAB's lending business. The June 2001 *Australian Financial Review* article quoted Andrew Linklater, an NAB executive, as saying: "NAB's HomeSide-branded mortgages, which were sold via mortgage brokers, had delivered 100 per cent growth per annum over the past two years."

94. However, on July 5, 2001, NAB announced that it would book a charge of $450 million ($568 million Australian) with the fiscal year writedown of the balance sheet value of the MSR held by HomeSide (the "July writedown"). In reaction to the revelation of the July writedown news, NAB's ordinary shares fell $1.80 Australian or more than 5%. The ADRs fell from $86.05 to $81.15, or 5.6%, on the news.

95. The July writedown represented approximately 10% of the then current book value of HomeSide's MSR.

96. In commenting on the July writedown in a NAB press release, dated July 5, 2001, Defendant Cicutto misleadingly stated: "Our underlying business is strong and performing well." Cicutto further stated that the "provision reflects the fact that we are a prudent bank with a disciplined approach for managing risk. That is why we have responded decisively and expeditiously to deal with this."

97. The statements by Defendant Cicutto in the July 5, 2001 press release were false and misleading as they portrayed a false sense of closure and resolution to the HomeSide problem, when in fact, less than two months later, NAB would shock the market with the revelation of a massive $1.75 billion write down,

98. At Credit Suisse First Boston's Sydney Invasion Lunch on August 21, 2001, NAB made a presentation wherein, among other things, it represented that it was a target for earnings per share growth of greater than 10%, notwithstanding the July writedown at HomeSide. This statement was false and misleading at the time it was made. In fact, NAB knew or was severely reckless in not knowing that less than two weeks later it would reveal a massive $1.75 billion writedown at its HomeSide unit, which in fact caused its earnings per share to decline, not grow.

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99. At the August 21, 2001 Sydney Invasion Lunch, NAB also represented that in response to HomeSide's July 2001 writedown, it now had taken remedial action to correct the situation by recording assets "at a sustainable realistic value" and by changes to "systems and procedures." These statements were also false and misleading at the time they were made, because, among other reasons, they falsely portrayed the situation at HomeSide, and its impact on NAB as being resolved, when, in fact, just two weeks later NAB would drop the $1.75 billion HomeSide writedown bombshell on the market.

100. Likewise, NAB's other representations with respect to HomeSide at the August 21, 2001, Sydney Investor Lunch such as "HomeSide's competitive situation remains strong" were false and misleading for the same reasons.

101. On Monday, September 3, 2001, Labor Day in the United States, NAB announced that it would incur a $1.75 billion writedown of the carrying value of HomeSide's operations. NAB determined that the carrying value of HomeSide's mortgage servicing rights far exceeded their fair value and that the asset was impaired.

102. Defendant Cicutto represented that the need for the writedown was recently discovered during NAB's analysis of its strategic options with respect to HomeSide and, specifically, during its review of the market sales value of the company.

103. The $1.75 billion writedown purportedly consisted of the following items:

- $400 million resulted from incorrect interest rate assumptions embedded in HomeSide's MSR valuation model;

- $760 million resulted from changed assumptions in the modeling; and

- $590 million represented a writedown of good will related to HomeSide

NAB further explained that:

> Based on an assessment of the impairment loss arising from the incorrect rate assumption in the internal valuation model, US$389 million of the impairment loss was attributed to the half-year ended March 31, 2001 and the remainder has been attributed to the half year ended September 30, 2001.

104. In reaction to the news, NAB's ordinary shares fell from $4.30 Australian to $28.90 Australian on the Sydney stock exchange on Monday, September 3, 2001. When trading resumed on September 4, 2001 after the Labor Day holiday, NAB's ADRs fell $10.24 to $78.24.

105. The weekend prior to the revelation of the writedown, Rayner formally resigned as Chairman of NAB, having stepped aside the prior month because of

an allegedly potential conflict of interest in another matter. Also on the weekend before the writedown, it was reported that Rayner had taken a leave of absence as a non-executive director.

106. In addition, on September 4, 2001 HomeSide's Harris, Race and Wilson "resigned".

107. At NAB, Chris Matton, head of group capital and balance sheet management during the Class Period, left the Company. Matton reported to Bob Prowse, who, in turn reported to Cicutto. When asked to comment on the HomeSide debacle, he declined to do so, reportedly stating that he would take his knowledge "to the grave".

108. On September 4, 2001, in commenting on the $1.75 billion writedown, Charles Allen, who was appointed Chairman at an emergency NAB board meeting on Sunday, September 2, 2001, stated:

> In the end of the day, it is a disaster for the organisation. I think no other National Bank chief executive has stood before you to announce a provision of this size. So it hasn't been a pleasant experience for me. I sincerely regret that taking such a decision proved necessary and can assure shareholders the National will carefully review the situation and learn from it.

109. In an effort to blunt criticism of Defendant Cicutto for the HomeSide debacle, Allen also stated on

September 3, 2001, "I was appointed chairman yesterday in fairly difficult circumstances. The board, quite unequivocally, has full support for Frank [Cicutto] and for the senior management of the National Australia Bank. There's no intention for Frank [Cicutto] to resign."

NAB Tries To "Spin" The HomeSide Debacle As An Inadvertent Error

110. In its Form 6-K for the full year 2001, filed in November 2001, NAB indicated that the problem, quite benignly was "discovered" to be an "incorrect interest assumption". Specifically the Form 6-K stated:

> In September, an incorrect interest rate assumption in the MSR valuation model was discovered, which had caused the model to understate HomeSide's sensitivity to interest rate movements, and overstate the value of its servicing rights, leaving the Group underhedged.

THE TRUTH BEHIND THE HOMESIDE DEBACLE

The Australian Financial Review Analysis

111. Far from an innocent error, and contrary to NAB's explanation that the HomeSide debacle was the result of essentially a few errant keystrokes, the *Australian Financial Review* ("AFR") reported that "some of the blame must lie with Cicutto and his team."

112. According to a September 8, 2001 article by AFR:

> The investigation reveals that HomeSide's hedging difficulties — which are one of the most important parts of the story — were apparent as far back as 1999. The AFR has been told that there had been warnings about failures in the hedging book, yet the problem continued to grow, finally spiralling out of control.
>
> NAB maintains that HomeSide's shock writedown — which totals almost $4 [Australian] billion — came out of the blue. But could the bank have done something about it earlier?
>
> Several former NAB executives interviewed by the AFR believe that the hedging problems should have been avoided. The executives were part of the bank's balance sheet and capital management teams based in Bourke Street.
>
> Since the bank bought HomeSide in 1997, they had watched as traders in New York struggled to hedge the subsidiary's growing mortgage book. As HomeSide continued to expand, efforts to balance out the effects of interest rate movements began to fall miserably.

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In 1998, HomeSide recorded net hedging gains of $657 million. But in 1999, hedging losses totalled a staggering $1.4 billion and in 2000 another $480 million was lost.

To put this into perspective, NAB's total profit in 1999 was $2.8 billion, HomeSide's profit that year was $153 million.

* * *

What worried the team in Melbourne was that things appeared to be out of control.

"The hedge numbers — the profit and loss — were all over the place and the volume was very high," one former executive says, speaking anonymously. "A huge amount of money was just swinging backwards and forwards, easily a couple of hundred million at any one time."

"A lot of people were very concerned and it came to me and I asked them to look into it, but it was ignored."

This executive, like many others, left NAB's balance sheet and capital management division during this period.

By early this year, HomeSide's mortgage book had grown to $US187 billion ($358 billion).

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This made the bank's New York-based dealers among the biggest options traders in the world. On some days, they would have to nearly corner the market in interest rate derivatives just to cover its massive exposures.

Things soon got out of hand. Falling interest rates are bad for mortgage servicers, so they try to hedge against rate movements. HomeSide struggled with this in the late '90s, and the situation deteriorated when the US Federal Reserve began slashing official rates earlier this year. It has now cut interest rates seven times in eight months.

The rate cuts, combined with a US accounting rule change which meant the hedging losses had to be booked, resulted in HomeSide's first writedown, of $870 million, announced in July.

The new accounting rule, known as FAS 133, changed the mortgage-servicing business overnight. The industry suddenly became a lot less attractive. But the hedging losses were not to be NAB's biggest problem. Deep in the bowels of HomeSide's Jacksonville, Florida headquarters, another time bomb was ticking away.

In the northern autumn of 1999, HomeSide's computers were overhauled. As part of the

change, a computer model that worked out the fees the business could expect was replaced. The model was vital to working out how much the HomeSide business was worth. It did this by estimating future interest rates and how quickly clients would pay off their home loans. It used a gross interest rate figure.

The new model used a net interest figure. HomeSide executives made a very simple and stupid mistake: they accidentally plugged the gross interest figure into the new model. The blunder — which was uncovered only during the past week — meant that since 1999, HomeSide's future revenue had been grossly over-estimated.

The mistake with the model cost NAB $US400 million ($766 million). But there was worse to come. Other assumptions in the model had to be changed. This cost $1.4 billion. An $858 million writedown of goodwill made up the remainder of the shock loss, and took the total to almost $4 billion.

The question remains: How did the bank which had first expanded overseas in 1987 suddenly find itself in so much difficulty?

The answer, according to the former NAB executives, is that HomeSide had too much independence. There was not enough hands-on control from Melbourne.

* * *

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> So where does the blame lie? HomeSide's long-serving boss, Joe Pickett, left in June — one month before the first writedown. Another three of HomeSide's most senior executives resigned this week.
>
> But, so far, no one is accepting any of the blame at the bank's Bourke Street headquarters. (Emphasis added.)

The Wachtell Lipton Investigation

113. The NAB Board of Directors commissioned an independent review into the events leading to the write-downs at HomeSide. That review, prepared by the law firm of Wachtell, Lipton, Rosen & Katz, with the assistance of specialist investment bank Promontory Financial Group (the "Wachtell Report"), was provided to the Board in early 2002. Charles Allen, the Chairman of NAB, sent a summary of the Wachtell Report to all NAB shareholders in January 2002.

114. Ivor Reis, a stockbroker in Melbourne, Australia and a NAB shareholder who received the summary of the Wachtell Report, published the following report in *Bulletin* magazine:

> The NAB board decided not to publicly release the Wachtell Lipton report, and I am told. this was mostly for legal reasons. But the snippets that NAB chairman Charles Allen did share with the bank's owners shows just how lax the

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NAB's internal risk controls had become between 1999 and 2001. One paragraph in particular sums up the NAB's risk management shortcomings.

"Group management [NAB head office in Melbourne] had effective internal audit and reporting mechanisms but was not in the executive suite at HomeSide [in Jacksonville, Florida]," Wachtell Lipton reported. "As a result, the group did not have day-to-day involvement in the management of HomeSide, and areas of risk management weakness that the group identified both during due diligence and during subsequent periodic visits were not corrected as immediately or rigorously as the group directed."

In other words, the NAB's senior management had been warned about the financial risks entailed in managing HomeSide's $US 180 bn ($355 bn) mortgage portfolio but a lack of follow-up and implementation left the bank exposed to huge losses in the event of unforeseen and large moves in interest rates. It's probably safe to assume the Wachtell Lipton report did not use the term "asleep at the wheel" but in my opinion that is the report's central conclusion.

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The True Reasons For the HomeSide/NAB Debacle

115. However, the debacle at HomeSide did not just result from the "very simple and stupid mistake" reported by AFR, or the "asleep at the wheel" theory advanced in the Wachtell Report. Instead, there was a more invidious basis for the debacle: purposeful manipulation of the valuation methodologies that made HomeSide's financial situation appear significantly better than in fact it was.

116. The reason the value of the portfolio had to be written down was that HomeSide executives, including but not limited to defendants Harris, Race and Wilson, and HomeSide employees Jay B. Busker and Azad Rafat, among others, had deliberately and regularly overvalued its portfolio, and resulting MSR, by hundreds of millions of dollars by modifying assumptions in the computer models used to produce the valuations.

117. During the Class Period, HomeSide arbitrarily changed assumptions in its valuation models, including MIAC Analytics, to increase the valuation of HomeSide's MSR portfolio by hundreds of millions of dollars more than a market-based valuation.

118. The way the process worked was that each month HomeSide downloaded a file from MIAC using its proprietary software called MIAC Analytics; which incorporated relevant market-based assumptions as reported on Bloomberg and plugged them into an internal model. These assumptions included the

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Bloomberg Median Prepayment Speed figures (prepayment figures are commonly referred to as "PSA" rates), discount rate assumptions and cost assumptions. MIAC itself used market-based assumptions from Bloomberg Media Interactive.

119. HomeSide then ran its models using changed assumptions for each tranche of HomeSide's mortgages that deviated from the MIAC market-based data, with the intention and result that this manipulation made HomeSide's financial situation appear far more positive than it was in fact.

120. A tranche is a group of mortgages with the same maturity, interest rate and risk characteristics. For example, one tranche might be comprised of 15-year Ginnie Mae ("GNMA") mortgages, another of 30-year GNMA mortgages.

121. In short, HomeSide manipulated prepayment and discount rate assumptions to lengthen the average life and duration of its mortgage portfolio, thereby artificially increasing the MSR yield of the portfolio and HomeSide's profitability.

122. Put differently, as interest rates go down, mortgage holders prepay and refinance their mortgages to take advantage of lower rates. The "rate" of these prepayments is reflected in the PSA "speed." The higher the PSA, the faster the level of repayment. As mortgages are prepaid, the MSR "asset" disappears. A prepaid mortgage no longer exists to be "serviced" and, thus,

there is no future earnings stream attributable to those servicing rights. Thus, the rate of prepayment, as embodied in the PSA rate, effects the current value of the MSR asset as well as a company's future earnings.

123. This manipulation is illustrated by a review of HomeSide's actual mortgage portfolio of 30-year and 15-year fixed rate conventional mortgages and GNMA-backed mortgages for the months of January and April 2000.

124. During this period, for example, HomeSide used prepayment rates that were sharply below the median prepayment speeds published by Bloomberg to value its portfolio of conventional 30-year and I5-year fixed rate mortgages. In some instances, the Bloomberg median PSA rates were 50% to 300% faster than the PSA rates used by HomeSide.

125. HomeSide also used considerably slower PSA prepayment rates in valuing its 30-year GNMA and especially its 15-year GNMA fixed rate mortgages during January 2000 and April 2000.

126. The median PSA rates published on Bloomberg each month show prepayment projections for unchanged interest rate environments as well as different "up" and "down" 50, 100 and 200 basis point interest rate change scenarios. Not only are the median PSA rates published, but Bloomberg shows each Wall Street firm's view on prepayments for the above scenarios.

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127. Applying the Bloomberg PSA rate to valuing a mortgage portfolio is an accepted industry standard.

128. However, the process by which HomeSide and NAB chose prepayment speeds to value HomeSide's mortgage portfolio was not reasonable and not consistent with standard industry practices. By slowing the PSA rates, HomeSide intentionally distorted the rate at which mortgages were being prepaid, artificially lengthened the average life of its portfolio and overvalued its portfolio.

129. The PSA prepayment rates used by HomeSide to value its newly originated, moderately seasoned, and seasoned 30-year fixed rate mortgages were significantly slower than. the Median PSA speeds published on Bloomberg for January 2000 and April 2000 in almost all interest rate scenarios.

130. For example, in January 2000, for newly originated 30-year mortgages in an unchanged rate scenario, HomeSide used 137% PSA, a prepayment projection that was almost 36% slower than the Bloomberg median prepayment speeds of 186% PSA. In a down 50 basis point rate scenario, HomeSide used 150% PSA, which was 85% slower than the Bloomberg median speed of 277% PSA.

131. The manipulation with respect to other possible interest rate scenarios was even greater where HomeSide used speeds that were, respectively, 132% and 280% slower than Bloomberg median PSA rates.

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132. For its moderately seasoned 30-year mortgages, HomeSide used PSA rates that were 22%, 27%, 52%, and 84% slower than the Bloomberg median PSA rates for unchanged interest rate scenarios, down 50 basis points scenarios, down 100 basis points scenarios, and down 200 basis point rate scenarios, respectively.

133. For its seasoned 30-year mortgages, HomeSide used PSA rates that were 19%, 36%, 63%, and 20% slower than the Bloomberg median PSA rates in unchanged, down 50 basis points, down 100 basis points, and down 200 basis point interest rate scenarios.

134. The manipulations for April 2000 were very similar in the 30-year sector. HomeSide used PSA rates to value its newly originated 30-year mortgages that were 8% to 34% slower in unchanged to down 300 basis point interest rate scenarios.

135. The same was true for its moderately seasoned and seasoned 30-year mortgagees. HomeSide used PSA rates that were 4% to 26% slower for unchanged to down 300 basis point interest rate movements for its moderately seasoned mortgages and PSA rates that were 2% to 22% slower for its seasoned mortgages.

136. With respect to HomeSide's moderately seasoned conventional 15-year mortgages in January 2000, for example, HomeSide used PSA rates that were 5% to 74% slower than the Bloomberg median PSA rates in down 50 basis points to down 300 basis point interest rate scenarios, respectively.

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137. In addition, for seasoned conventional 15-year mortgagees in January 2000, HomeSide used PSA rates that were 15% to 67% slower for down 50 to down 300 basis point interest rate scenarios.

138. For April 2000, in the conventional 15-year sector, the PSA rates used by HomeSide were significantly slower on percentage basis. For example, for its 15-year seasoned mortgages, HomeSide used 139% PSA which was 39% slower than the Bloomberg median speed of 193% PSA in the base case scenarios. If rates fell 50, 100, 200 and 300 basis points, HomeSide used PSA rates that were, respectively, 36%, 40%, 30%, and 17% slower than the Bloomberg median PSA rates.

139. With respect to its GNMA mortgages, in January 2000, HomeSide used PSA rates that were 30% slower in base case interest rate scenarios to 379% slower in down 200 basis point scenarios for newly originated mortgages. Moderately seasoned GNMA 30-year mortgages were made up to 112% slower in the down 200 basis point interest rate scenario.

140. In April 2000, HomeSide used PSA rates that were, respectively, 25%, 30%, 24% and 7% slower in unchanged interest rate scenarios, down 50 basis points scenarios, down 100 basis points scenarios, and down 200 basis point interest rate scenarios for its GNMA 30-year mortgages.

141. The manipulations for January and April 2000, for example, were even more pronounced in HomeSide's 15-year GNMA mortgages.

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142. In January 2000, for newly originated 15-year GNMAs in an unchanged interest rate scenario, HomeSide used 145% PSA, which was 18% slower than the 171% Bloomberg median PSA rate. In falling 50 basis point interest rate scenarios, 100 basis point scenarios and 200 basis point scenarios, HomeSide used prepayment speeds that were, respectively, 28%, 62%, and 65% slower.

143. For moderately seasoned 15-year GNMA mortgages, HomeSide used PSA rates that were 26%, 34%, 29%, and 106% slower that the median PSA speeds published on Bloomberg for rates staying unchanged, rates falling 50 basis points, rates falling 100 basis points, and rates falling 200 basis points, respectively. For seasoned 15-year GNMAs, HomeSide used PSA speeds that ranged from 12% to 52% slower.

144. A similar outcome was achieved in April 2000 for 15-year GNMAs. For newly originated 15-year mortgages, HomeSide used PSA speeds that were consistently slower across all interest rate scenarios. For example, in unchanged interest rate scenarios, down 50 basis points scenarios, down 100 basis points scenarios and down 200 basis points scenarios, HomeSide used prepayment rates that were respectively, 56%, 58%, 52%, and 43% slower than the Bloomberg median PSA rates.

145. For moderately seasoned 15-year GNMAs in April 2000, the results were even more dramatic. HomeSide used PSA rates that were respectively, 65%, 68%, 64% and 71% slower for the identical unchanged

rate scenarios, down 50 basis points scenarios, down 100 basis points scenarios, and down 200 basis point interest rare scenarios.

146. Another aspect of defendants' inappropriate manipulation concerned the valuation methodology applied to new pools of mortgages HomeSide had acquired. HomeSide would use the MIAC software to value the pools to be acquired, but once acquired, HomeSide would enter the value of the pools on the books at a value higher than the acquisition price.

147. HomeSide also violated impairment rules by moving loans from pool to pool to make "bad" pools "better" so it would not have to declare the pools "impaired" and write them off.

148. In or about July 2000, employees of HomeSide, who were concerned about the inappropriate manipulation of the valuation methodology to artificially inflate the value of HomeSide's portfolio, delivered a letter by the United States mails and/or facsimile to: (a) Defendant Cicutto; (b) NAB's risk management department in Melbourne, Australia; and (c) the auditing department of KPMG, then the outside auditor for HomeSide. In this letter, the employees provided a detailed description of the process by which defendants Harris, Race and Wilson manipulated the prepayment and discount rate assumptions to achieve the desired effect and directed the recipients to specific electronic files that would document the fraudulent scheme.

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149. For more than 13 months prior to NAB's disclosure that it would write off $1.75 billion due to problems at HomeSide, defendants NAB and Cicutto had direct knowledge of the specific manipulation of the valuation methodologies that made HomeSide's financial situation appear significantly better than it was.

150. The statements identified in paragraphs 58, 62, 65, 67, 69, 70, 72, 73, 75, 76, 79, 80, 82, 83, 84, 86, 90, 91, 93, 96, 98, and 99 were materially false and misleading in that, *inter alia*, at the time they were made, defendants knew that:

(a) HomeSide's portfolio and its resulting financial performance were based on a manipulated portfolio modeling; and

(b) defendants had deliberately and regularly overvalued HomeSide's portfolio by hundreds of millions of dollars by modifying assumptions in its computer models to produce false and misleading valuations.

151. Defendants failed to disclose the above-referenced material facts at the time they made their statements to the market, as alleged above, concerning the financial performance of HomeSide and NAB.

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DEFENDANTS' INSIDER SELLING. AND PROFIT FROM THE FRAUD

152. While NAB's and HomeSide's insiders were issuing false and misleading statements about NAB's business and finances, Defendant Cicutto sold shares of NAB he owned for proceeds of $3.1 million Australian dollars to profit from the artificial inflation in NAB's stock price defendants' false statements had created.

153. Notwithstanding his access to non-public information as a result of his position with the Company, Cicutto exercised 200,000 executive options in mid-June 2001. At a conversion price of $16.62 Australian, Cicutto's new shares were valued at $3,566,000 Australian on June 15, 2001, when NAB shares closed at a near high of $34.45 Australian.

154. Cicutto acquired the options in early 1997, and had until February 2002 to exercise the options. Less than three months after exercising the options, the manipulation of the valuation methodologies at HomeSide were publicly revealed.

155. The stock sales by Cicutto were unusual in timing and amount.

156. In addition, defendants received substantial monetary gain from their fraudulent activities. In 2000, NAB announced that it was introducing a performance-linked executive pay system, known as Economic Value Added or EVA, based on economic value that individuals add to the Company.

157. As a result of this performance-linked executive pay system, Cicutto, for the Company's financial year ending on September 30, 2000, received a salary package of almost $2 million Australian, including performance-based bonuses of $550,000 Australian on top of his $1.3 million Australian base salary.

158. For the Company's financial year ending September 30, 2001, Cicutto received a salary package of $2.92 million Australian, including performance-based bonuses of $1.35 million Australian.

159. These performance-based bonuses paid to Cicutto were derived, in substantial part, from the economic value purportedly added to NAB's economic performance by the manipulated operations at HomeSide. For example, NAB disclosed in its 2001 Annual Financial Report, dated November 8, 2001, that the economic value added to NAB prior to the HomeSide debacle was $1.431 million Australian in 2001, and that the net impact of the HomeSide debacle on EVA in 2001 was $407 million Australian. Accordingly, the inflated HomeSide economic value constituted almost 30% of NAB's entire EVA for 2001, which substantially increased Cicutto's performance-based bonuses.

160. For the Company's financial year ended September 30, 2001, defendant Harris received a salary package of approximately $4.538 million Australian, including long-term incentive payments of $1,918,889 relating to the three year performance from April 1, 1998 to March 31, 2001. These incentive payments were based

on performance targets, which targets were achieved through defendants' manipulation of the valuation methodologies at HomeSide.

DEFENDANTS' SCIENTER

161. As alleged herein, defendants acted with scienter in that defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, the Individual Defendants, as described herein, by virtue of their receipt of information reflecting the true facts regarding NAB, their control over, and/or receipt and/or modification of the allegedly materially misleading misstatements and omissions described herein, which made them privy to confidential proprietary information concerning NAB, participated in the fraudulent scheme alleged herein.

162. Scienter is established not only by the actual knowledge or severe recklessness of NAB's conduct, but also by two secondary offerings, collectively raising more than $2 billion, one in June 1999 and the other in January 2001, which were premised upon the promise and performance of HomeSide.

163. Scienter is further established by NAB's January 5, 2001 issuance of $1.1 billion of residential mortgage-backed securities through its HomeSide Mortgage Securities Trust Program. The securities were registered in the United States and sold to investors in the United States and globally. During the Class Period, defendants knew, or recklessly disregarded HomeSide's lack of financial controls and its resulting grave financial condition, contrary to what was being reported to the public.

164. On or about January 29, 2001, NAB issued a press release commenting on the alleged success of HomeSide, and touting the January 5, 2001 offering. Regarding the offering, NAB's Chief Financial Officer, Richard McKinnon, stated, "[w]e also achieved a distribution of investors in the United States, Europe and Asia. The pricing reflects the strength of the National as an issuer, the Group's mortgage securitisation experience through HomeSide and a recognition by investors of the quality of the National's mortgage loans."

165. Additionally, around the time of the January 5, 2001 offering, HomeSide established partnerships with various United States corporations to provide on-line mortgage services; including, on December 11, 2000, with Byowner.com, on December 12, 2000, with The Bekins Company, on December 14, 2000, with Suddath Relocation Services, on January 8, 2001, with NewHomes.com, and on January 3, 2001, with BET.com. The establishment of such partnerships in close

proximity to the January 5, 2001, offering served to further bolster the illusion of HomeSide's success, and NAB's "secure" presence in the United States.

UNDISCLOSED MATERIALLY FALSE INFORMATION

166. The market for NAB's securities was open, well-developed and efficient at all relevant times. As a result of these materially false and misleading statements and failures to disclose, NAB's securities traded at artificially inflated prices during the Class Period. The artificial inflation continued until the time NAB admitted and/or the market came to realize the nature and extent of the problems of HomeSide and the impact of those problems on NAB.

167. Plaintiffs and other members of the Class purchased or otherwise acquired NAB securities relying upon the integrity of the market price of NAB's securities and market information relating to NAB, and have been damaged thereby.

168. During the Class Period, defendants materially misled the investing public, thereby inflating the price of NAB's securities, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make defendants' statements, as set forth herein, not false and misleading. Said statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about the manipulation in the mortgage portfolio modeling as alleged herein.

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169. At all relevant times, the material misrepresentations and omissions particularized in this Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by Plaintiffs and other members of the Class. As described herein, during the Class Period, defendants made or caused to be made a series of materially false or misleading statements about NAB's business, prospects and operations. These material misstatements and omissions had the cause and effect of creating in the market an unrealistically positive assessment of NAB and its business, prospects and operations, thus causing the Company's securities to be overvalued and artificially inflated at all relevant times. Defendants' materially false and misleading statements during the Class Period resulted in Plaintiffs and other members of the Class purchasing the Company's securities at artificially inflated prices, thus causing the damages complained of herein.

APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE-MARKET DOCTRINE

170. At all relevant times, the market for NAB's securities was an efficient market for the following reasons, among others:

(a) NAB's ADRs met the requirements for listing, and were listed and actively traded on the NYSE, a highly efficient and automated market;

(b) NAB's ordinary shares met the requirements for listing, and were listed and actively traded on the ASX, LSE and other exchanges, all highly efficient markets;

(c) As a regulated issuer, NAB filed periodic public reports with the SEC, the NYSE, and the ASIC;

(d) NAB regularly communicated with public investors via established market communication mechanisms, including through regular dissemination of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and

(e) NAB was followed by several securities analysts employed by major brokerage firms who wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

171. As a result of the foregoing, the market for NAB's securities promptly digested current information regarding NAB from all publicly available sources and reflected such information in NAB's securities prices. Under these circumstances, all purchasers of NAB's securities during the Class Period suffered similar injury through their purchase of NAB's securities at artificially inflated prices and a presumption of reliance applies.

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NO SAFE HARBOR

172. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this complaint. Many of the specific statements pleaded herein were not identified as "forward-looking statements" when made. To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved by an executive officer of NAB who knew that those statements were false when made.

FIRST CLAIM FOR RELIEF

Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against All Defendants

173. Plaintiffs repeat and reallege each and every paragraph contained above as if set forth herein. This Claim is asserted against all defendants.

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174. Defendants knew, or were reckless in failing to know, of the material omissions from and misrepresentations contained in the statements as set forth above.

175. Throughout the Class Period, defendants, with knowledge of or reckless disregard for the truth, disseminated or approved releases, statements and reports, referred to above, which were misleading in that they contained misrepresentations and failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

176. During the Class Period, defendants, individually and via a fraudulent scheme, directly and indirectly, participated in a course of business that operated as a fraud or deceit on purchasers of NAB securities and concealed material adverse information regarding the then existing business conditions and financial outlook of the Company as specified herein. Defendants employed devices, schemes and artifices to defraud and engaged in acts, practices and a course of business as herein alleged to commit a fraud on the integrity of the market for the Company's securities and to maintain artificially high market prices for the securities of NAB. This included the formulation, making of and/or participation in the making of, untrue statements of material facts and the omission to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaging in acts,

practices and a course of business which operated as a fraud and deceit upon Plaintiffs and the Class, all in connection with the purchase or acquisition of NAB securities by Plaintiffs and members of the Class.

177. By reason of the conduct alleged herein, defendants knowingly or recklessly, directly and indirectly, have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that they: (a) employed devices, schemes and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices and a course of business that operated as a fraud or deceit upon Plaintiffs and others similarly situated in connection with their purchases of NAB securities.

178. Plaintiffs and the Class have suffered substantial damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for NAB securities as a result of defendants' violations of Section 10(b) of the Exchange Act and Rule 10b-5. Plaintiffs and the Class would not have purchased NAB securities at the prices they paid, or at all, if they had been aware that the market prices had been artificially and falsely inflated by defendants' misleading statements and concealment. At the time of purchase by Plaintiffs and the Class of NAB ADRs the fair and true market value of said securities was substantially less than the prices paid by them.

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SECOND CLAIM FOR RELIEF

For Violation Of Section 20(a) Of The Exchange Act Against the Individual Defendants

179. Plaintiffs repeat and reallege each and every paragraph contained above as if set forth herein. This Claim is asserted against the Individual Defendants.

180. Each of the Individual Defendants acted as a controlling person of the Company within the meaning of Section 20 of the Exchange Act. NAB controlled each of the Individual Defendants. Each controlling person had the power and authority to cause others to engage in the wrongful conduct complained of herein.

181. By reason of such wrongful conduct, the defendants named in this Claim are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of their wrongful conduct, Plaintiffs and the other members of the Class suffered damages in connection with their purchases of the Company's securities.

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REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief and judgment, as follows:

(a) Determining that this action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

(b) Awarding compensatory damages in favor of Plaintiffs and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

(c) Awarding extraordinary, equitable and/or injunctive relief as permitted by law, equity and the federal statutory provisions sued hereunder;

(d) Awarding Plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

(e) Such other and further relief as the Court may deem just and proper.

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JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: New York, New York
January 30, 2004

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APPENDIX D — AFFIDAVIT OF ROBERT W. BERLINER DATED APRIL 12, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No.: 03 Civ. 6537 (BSJ) (AJP)

CLASS ACTION

In re NATIONAL AUSTRALIA BANK SECURITIES LITIGATION

AFFIDAVIT OF ROBERT W. BERLINER CPA, CFE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Robert W. Berliner, being duly sworn, deposes and says:

1. I have been retained by counsel for Lead Plaintiffs, Goodkind Labaton Rudoff & Sucharow LLP, to express an opinion as to whether National Australia Bank ("NAB") violated generally accepted accounting principles ("GAAP") pertaining to its accounting for and reporting of certain mortgage servicing rights and its hedging of certain risks related thereto during the interim quarters of NAB's fiscal year ended September 30, 2001.

2. I have been a certified public accountant for more than 40 years and am currently licensed in the States of New York and New Jersey. I also am a certified fraud

examiner. I am affiliated with Marks Paneth & Shron, LLP, a firm of certified public accountants.

3. A copy of my curriculum vitae is annexed hereto as Exhibit A. As detailed therein, as an auditor and litigation services consultant, I have devoted my entire professional life to the practice of public accounting. Following my graduation from the University of Pennsylvania's Wharton School of Business in 1954, I joined the international accounting firm of Arthur Young & Company — one of the acknowledged "Big Eight" accounting firms prior to its merger with Ernst & Whinney during the late 1980s — where I served as an audit partner from 1976 to 1987. After leaving Arthur Young in 1987, I became a member of the accounting firm of Spicer & Oppenheim, where I served as National Executive Director of Accounting and Auditing, and as Chairman of the Firm's Accounting and Auditing Standards Committee.

4. As a member of the Emerging Issues Task Force ("EITF") of the Financial Accounting Standards Board ("FASB"), I have participated in the development of the private sector's response to emerging financial accounting and reporting issues. Also, as chairman and/or a member of numerous other committees and task forces of FASB, the Securities and Exchange Commission, the AICPA, and the New York State Society of Certified Public Accountants, I have been active in professional matters for many years. Consequently, I am quite familiar with GAAP, which are the principles that underlie the presentation of financial statements.

5. I have reviewed and am fully familiar with the allegations asserted in the Consolidated Class Action Complaint (the "Complaint") filed by Lead Plaintiffs Russell Leslie Owen, Brian and Geraldine Silverlock, and Robert Morrison, individually and on behalf of all other persons similarly situated. I have reviewed and am familiar with the Memorandum of Defendants National Australia Bank Limited and Frank Cicutto in Support of their Motion to Dismiss and with the Memorandum of Law of Lead Plaintiffs' opposition thereto.

6. Among other things, the Complaint alleges that NAB's originally reported mortgage service rights were overstated as of December 31, 2000, March 31, 2001 and June 30, 2001, and that its results of operations for the three months ended December 31, 2000, the six months ended March 31, 2001, and the nine months ended June 30, 2001 were materially overstated. In December 2001, NAB's subsidiary HomeSide International, Inc. ("Homeside") filed amended financial statements for each of the first three quarters of the year on Form 10-Q/A thereby acknowledging that material errors had been committed in the originally filed financial statements.

7. The restatements reflected reductions of the previously reported carrying values of Homeside's mortgage service rights, adjustments of previously reported amortization expense pertaining thereto, and newly reported losses on derivatives that had purported to serve as hedges against losses from accelerated

prepayments of underlying mortgages. Homeside's originally reported pretax income before cumulative effect of a change in accounting principle for the first quarter of $26,265,000 was restated to be a pretax loss before cumulative effect of a change in accounting principle of $240,174,000. For the six months ended March 31, 2001, its pretax loss before cumulative effect of a change in accounting principle was restated to $342,246,000 from $20,980,000. For the nine months ended June 30, 2001, its pretax loss before cumulative effect of a change in accounting principle and extraordinary item was restated to $756,053,000 from $434,788,000.

8. In forming my opinion as to whether the financial statements mentioned above violated GAAP as originally filed, I am relying on the expert opinion of Ms. Bella Borg Brenner that NAB disregarded published data in January, February and April 2000 that was critical to and embedded in the formulae for determining the fair value of the mortgage servicing rights. I understand that her opinion is that NAB's prepayment speed assumption ("PSA") rates were vastly different from the PSA rates published by Bloomberg and constituted an extreme departure from industry standards.

9. In my opinion, NAB's original accounting for the mortgage servicing rights, amortization of mortgage servicing rights, and the derivatives purporting to serve as hedges against loss from accelerated prepayments of underlying mortgages violated GAAP, and that such

violations caused the originally issued financial statements reflecting these errors to be false and misleading.

10. The mortgage servicing rights were materially overstated in violation of Statement of Financial Accounting Standard ("SFAS") No. 125 and No. 140, both titled *Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities.* SFAS 125 was issued in June 1996 and was replaced by SFAS 140, which was issued September 2000, and which became effective for transactions occurring after March 31, 2001. The accounting for mortgage servicing rights set forth in SFAS 125 was unchanged by SFAS 140.

11. These financial accounting standards require the mortgage servicing entity to evaluate and measure impairment of its servicing assets and to recognize any such impairment by establishing a valuation allowance. The amount of impairment recognized shall be the amount by which the carrying amount of the servicing assets exceeds their fair value.

12. According to these standards, valuation techniques used in estimating fair value shall be consistent with the objective of measuring fair value and shall incorporate assumptions that market participants would use in their estimates of values, future revenues, and future expenses, including assumptions about interest rates, default, prepayment, and volatility. By underestimating PSA rates, HomeSide overstated the fair value of its mortgage servicing rights.

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13. The overstated fair values of the mortgage service rights resulted in another GAAP violation, which was the failure to record loss on derivatives that no longer qualified as effective hedges against risk of loss from accelerated prepayments of the underlying mortgages, in conformity with SFAS 133, *Accounting for Derivative Instruments and Hedging Activities.*

14. SFAS 133 became effective for NAB and its subsidiaries on October 1, 2000. Like SFAS 80, which it superseded, SFAS 133 required a "high correlation" for a designated hedge to continue to be treated as such. The restatements of the valuations of mortgage service rights "broke" the correlation (i.e., rendered the hedge to be ineffective). Accordingly, in the restatements that were made, losses on the broken hedges were reported.

I declare under penalty of perjury of the laws of the State of New York that the foregoing is true and correct.

Executed this 12th day of April 2004 New York, New York.

s/ Robert W. Berliner
ROBERT W. BERLINER, CPA, CFE

Appendix D

Exhibit A

ROBERT W. BERLINER, CPA, CFE
CURRICULUM VITAE

PROFESSIONAL EXPERIENCE

1990 to Date **Marks Paneth & Shron LLP**

Director of Litigation Services
Accounting and Auditing
Consultations

1987 to 1990 **Spicer & Oppenheim**

National Executive Director of
Accounting and Auditing
Chairman, National Accounting and
Auditing Standards Committee
Member, International Audit
Committee
National Director of Education
New York Office Director
of Litigation Support Services

1954 to 1987 **Arthur Young (now Ernst & Young)**

1976 to 1987 National Director of Practice
Development – Accounting and
Auditing
Assistant National Director of
Auditing (National Office)

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1970 to 1976	Client-Handling Partner (New York Office)
1967 to 1970	Managing Partner (Sao Paulo, Brazil Office)
1958 to 1967	Audit Principal, Audit Manager & Senior Accountant (New York Office)
1956 to 1958	Military Service – U.S. Army
1954 to 1956	Staff Accountant (New York Office)

PROFESSIONAL ACTIVITIES

American Institute of Certified Public Accountants:

1987 to 1991	Member of Forecasts and Projections Task Force
1982 to 1984	Member of Financial Feasibility Study Group
1982 to 1984	Chairman of Task Force on Auditor Involvement with Current Value Information
1980 to 1984	Chairman of Task Force on Materiality and Audit Risk
1979 to 1982	Chairman of Task Force on Required Supplementary Information

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1979 to 1982	Member of Auditing Standards Board
1979 to 1982	Member of Planning Subcommittee of the Auditing Standards Board
1977 to 1978	Chairman of Task Force on Current Value Disclosures
1976 to 1979	Member of Task Force on Conceptual Framework of Accounting and Reporting

Financial Accounting Standards Board:

1987 to 1989	Member of Emerging Issues Task Force
1987 to 1989	Member of FAS 96 Implementation Task Force
1983 to 1985	Member of Task Force for the Review of FAS 33

Securities and Exchange Commission:

1976 to 1978	Member of Replacement Cost Disclosure Advisory Committee

New York State Society of Certified Public Accountants:

2002 to Date	Member of Auditing Standards and Procedures Committee

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1992 to Date	Member of Litigation Support Committee
1989 to 1992	Member of General Committee on Accounting and Auditing
1983 to 1986	Member of Professional Ethics Committee
1987 to 1989	Chairman of Professional Ethics Committee

New York University Stern School of Business:

1986 to 1991	Adjunct Professor of Accounting
1984 to 1987	Management Development Laboratory Board Member
1976 to 1986	Ross Institute of Accounting Research – Board of Editorial Advisors

Executive Enterprises:

1977 to 1987	Member of Corporate Accounting Advisory Council

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University of Michigan:

1983 to 1987	Member of Paton Accounting Center Advisory Board

Community Activities

Cannon Point South, Inc.

2002 to Present	Treasurer and Member of the Board of Directors

Florham on The Fairways Condominium Association:

1985 to 2000	President and Member of the Board of Trustees

New Philharmonic Orchestra of New Jersey:

1994 to 2000	Chairman of the Finance Committee
1993 to 2000	Member of the Board of Trustees

New York University:

1988 to 1989	Vice Chairman of the Alumni Council
1986 to 1989	Member of the Alumni Council

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New York University Stern School of Business:

1987 to 1988	President of the Alumni Association
1973 to 1988	Member of the Board of Directors of the Alumni Association

Education

New York University Stern School of Business – M.B.A., 1961

Wharton School, University of Pennsylvania – B.S. in Economics, 1954

Beta Alpha Psi Honorary Accounting Fraternity, President

Beta Gamma Sigma Honorary Society

Professional Certification

Certified Fraud Examiner, Association of Certified Fraud Examiners, 1995

Certified Public Accountant, New Jersey, 1992

Certified Public Accountant, New York, 1960

Appendix D

PROFESSIONAL MEMBERSHIPS

Accountants Club of America

American Accounting Association

American Institute of Certified Public Accountants

Institute of Management Accountants

New York State Society of Certified Public Accountants

APPENDIX E — AFFIDAVIT OF BELLA BORG BRENNER DATED APRIL 9, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Master File No. 03 Civ. 6537 (BSJ) (AJP)

CLASS ACTION

In re NATIONAL AUSTRALIA BANK SECURITIES LITIGATION

I, BELLA BORG BRENNER, hereby certify, pursuant to 28 U.S.C. § 1764, as follows:

1. I have been retained by counsel for the Lead Plaintiffs, Goodkind Labaton Rudoff & Sucharow LLP, to express an opinion on the valuation methodology used by HomeSide Lending ("HomeSide") to value its mortgage portfolio comprised of 30-year and 15-year fixed rate conventional and GNMA-backed mortgages.

2. As set forth in more detail in Exhibit A annexed hereto. I have 22 years of experience as a practitioner in the mortgage-backed securities industry. During this period of time, I acted in the capacity of trader, mortgage research analyst and investment banker. As a mortgage research analyst, I created prepayment models for adjustable and fixed rate mortgages. I structured many classes of agency and non-agency backed Collateralized Mortgage Obligations ("CMOs"). For both securitizations and private placements, I have analyzed the underlying collateral quality. Additionally,

Appendix E

I traded CMOs in the secondary market in the course of which I was required to update the underlying collateral of any non-agency CMO traded in the secondary market.

3. After considering all the materials presented to me by counsel and based on my extensive experience in the mortgage-backed securities industry, it is my opinion that:

(a) NAB used prepayment speeds significantly below the median prepayment speeds published on Bloomberg to value its portfolio of conventional 30-year and 15-year fixed rate mortgages in January 2000, February 2000 and April 2000. (I have not yet completed a review of other time periods.) In some instances the Bloomberg median PSA rates were 50% to 300% faster than the PSA rates used by NAB. The median PSA rates are published on Bloomberg each month and show prepayment projections for an unchanged rate environment or where mortgages will prepay in up 50, 100, 200, and 300 basis point scenarios and down 50, 100, 200, and 300 basis point rate movements. In addition to the median PSA rate, Bloomberg details each Wall Street firm's prepayment projections.

(b) NAB used considerably slower prepayment PSA rates in valuing its GNMA 15-year and 30-year fixed rate mortgages during January 2000, February 2000 and April 2000; and

(c) The process by which NAB chose its prepayment speeds to value its mortgage portfolio was an extreme departure from industry standards, could not have happened by chance or even gross sloppiness and was pervasive in the period reviewed. In my opinion given the pervasiveness and the size of the differences from the Bloomberg published rate and other reported sources, I infer that this conduct constituted a conscious effort to misrepresent the value of the MSRs.

4. The following comments represent my opinions:

(a) The PSA prepayment rates used by NAB to value its newly originated, moderately seasoned and seasoned 30-year fixed rate mortgages are significantly slower than Median PSA speeds published by Bloomberg for January 2000, February 2000 and April 2000 in almost all interest rate scenarios. For example, in January 2000, for newly originated mortgages in an unchanged rate scenario, NAB used 137% PSA, a prepayment speed that was almost 36% slower than the Bloomberg median prepayment speed of 186% PSA. In a down 50 basis point scenario, NAB used 150% PSA — 85% slower than the Bloomberg median speed of 277% PSA. The difference becomes even more pronounced in the down 100 and 200 basis point scenarios. In these cases NAB used speeds that were 132% and 280% slower than Bloomberg median PSA rates, respectively. For its moderately seasoned mortgage portfolio, NAB used PSA rates that were 22%, 27%, 52% and 84% slower than the Bloomberg median PSA rates in unchanged, down 50, down 100 and down 200 basis point rate scenarios,

respectively. For its seasoned mortgages, NAB used PSA rates that were 19%, 36%, 63% and 20% slower than the Bloomberg median PSA rates in unchanged, down 50 basis points, down 100 basis points and down 200 basis point rate scenarios, respectively.

(b) In January 2000, for moderately seasoned conventional 15-year mortgages, NAB used PSA rates that were 5% to 74% slower than the Bloomberg median PSA rates in down 50 basis points to down 300 basis point rate interest rate scenarios. In addition, for seasoned 15-year mortgages in January 2000, NAB used PSA rates that were 15% to 67% slower for the same rate scenarios.

(c) The results for April 2000 are very similar in the 30-year sector. NAB used PSA rates to value its newly originated 30-year mortgages that were 8% to 34% slower in unchanged to down 300 basis point rate scenarios. For example, if interest rates fell 50 basis points, NAB used a 235% PSA rate which is 23% slower than the 288% median PSA that Bloomberg published. The same holds true for moderately seasoned and seasoned 30-year mortgages. NAB used PSA rates that were 4% to 26% slower for unchanged to down 300 basis point interest rate movements for its moderately seasoned mortgages and PSA rates that were 2% to 22% slower for its seasoned 30-year mortgages.

(d) For April 2000, in the 15-year sector, the PSA rates used by NAB were significantly slower on a percentage basis. For example, for its 15-year seasoned

mortgages, NAB used 139% PSA which was 39% slower than the Bloomberg median speed of 193% PSA in the base case scenario. If rates fell 50, 100; 200 and 300 basis points, NAB used PSA rates that were 36%, 40%, 30% and 17% slower than the Bloomberg median PSA rates.

(e) For newly originated 30-year GNMA mortgages in January 2000, NAB used PSA prepayment rates than were 30% slower in the base case to 379% slower is the down 200 basis point rate scenario. Moderately seasoned 30-year mortgages were up to 112% slower in the down 200 basis point scenario. In April 2000, NAB used PSA rates that were 25%, 30%, 24% and 7% slower in the base case, down 50 basis points, down 100 basis points and down 200 basis point scenarios, respectively.

(f) For January, February and April 2000, 15-year GNMAs were clearly understated. For example, in January 2000, for newly originated 15-year GNMAs, in an unchanged rate scenario NAB used 145% PSA speed, 18% slower than the 171% Bloomberg median PSA rate. In falling rate 50 basis point, 100 basis point and 200 basis point scenarios, NAB used prepayment speeds that were respectively, 28%, 62% and 65% slower. For moderately seasoned collateral, NAB used PSA rates that were 26%, 34%, and 29% and 106% slower than the median speeds published on Bloomberg for rates remaining unchanged, down 50 basis points, down 100 basis points and down 200 basis point scenarios, respectively. Finally, for seasoned 15-year GNMA collateral, NAB used PSA speeds that were 12% to 52% slower.

(g) A similar outcome is seen in April 2000 for 15-year GNMAs. For newly originated 15-year GNMAs, NAB used PSA speeds that were consistently slower across all interest rate scenarios. For example, in unchanged, down 50 basis points, down 100 basis points and down 200 basis points, NAB used prepayment speeds that were respectively, 56%, 58%, 52% and 43% slower than the Bloomberg median PSA rates. For moderately seasoned 15-year GNMAs, the results were even more dramatic. NAB used PSA rates that were respectively, 65%, 68%, 64% and 71% slower for the identical unchanged, down 50 basis points, down 100 basis points and down 200 basis point rate scenarios. In fact, even in increasing rate scenarios, NAB used PSA rates that were dramatically slower than those projected by the Bloomberg median PSA rates. For example, in the up 50 basis point scenario, NAB used a 99% PSA, 73% slower than the 171% Bloomberg median PSA rate. For up 100 and 200 basis point rate scenarios, NAB used PSA rates that were respectively, 88% and 147% slower than the Bloomberg median PSA rates.

5. The net effect of this effort was to inflate the value of the mortgage servicing rights by misrepresenting the value of the underlying pool of mortgages being serviced. Mortgage pools are typically valued for financial statements and other purposed based in part on the current existing estimates of interest rates. The PSA speed is one of the standard estimating techniques. It represents the current view of how fast mortgages will be repaid because the holder has refinanced his or her property at a new lower interest

rate. It thus represents how soon the payments on the underlying mortgages will cease and how soon the mortgage servicing rights will "disappear" because the underlying mortgages have been paid off.

6. In addition, industry practice is for owners of MSRs to hedge the interest rate risk by, in essence, "shorting" the value of the MSRs. Of course, if the persons creating this hedge are told they are hedging an asset whose value or size is inflated, the hedge will end up being too large. Thus, it is not surprising that, as alleged in the complaint, HomeSide had large hedging losses as a consequence of the MSRs being overvalued.

I declare under penalty of perjury of the laws of the States of Florida and New York that the foregoing is true and correct.

Executed at Surfside, Florida this 9th day of April, 2004.

s/ Bella Borg Brenner
BELLA BORG BRENNER

Appendix E

EXHIBIT A

Qualifications

Bella Borg is an equity and financial derivatives consultant and investment banker who has worked for the last 22 years in private equity, equity research, fixed income trading and fixed income research and has extensive experience and knowledge in the securities markets. She is presently employed as a Managing Director of Newtek Securities, a NASD licensed broker dealer that acts as a placement agent on private equity and private debt raises for small to mid-sized companies. Ms. Borg is also responsible for the monthly pricing of a mortgage portfolio comprised of FNMA pass-throughs and CMO derivatives for a hedge fund. In recent years Ms. Borg has performed litigation risk analysis and expert testimony on security pricing and suitability issues and equity markets, including Corporates, CBOs and CDOs, ABS, MBS, MBS derivatives, CMBS, fixed income options, and financial futures, and equity derivatives such as options, futures and warrants.

Prior to joining Newtek Capital in 1998, Ms. Borg spent over seventeen years in the fixed income and mortgage research departments as well as mortgage trading departments at firms now known as The First Southwest Company, Smith Barney, Merrill Lynch, Bear Stearns and Credit Suisse First Boston. Ms. Borg was employed as a research analyst specializing in all aspects

of the fixed income markets, including MBS, MBS derivatives, swaps, options, futures, money markets, Corporates, ABS, CBOs and CMBS, a trader of adjustable rate mortgages, mortgage derivatives including floaters, inverse floaters, Inverse IO's, and PAC IO's, CMO residuals and an investment banker structuring whole loan-backed CMOs and Asset-backed securities, securing warehouse lines, equity and debt financing and Credit ratings on new and credit sensitive products. She worked extensively with financial derivatives, Treasuries, asset-backed securities, mortgage and mortgage-related products.

From 1995 until late 1997, Ms. Borg worked at The First Southwest Company. Her responsibilities included: creating marketing materials for foreign denominated assets; identifying new asset classes for investors, e.g., structured settlements, tax liens and lottery cash flows; analyzing and pricing mortgage derivatives; including inverse floaters, Inverse IO's and PAC IO's; structuring sub-prime fixed and adjustable rate mortgages; pricing asset-backed structures including sub-prime auto receivables and structured settlement ABS.

From June 1994 through June 1995, Ms. Borg worked at Smith Barney as a senior trader on the mortgage derivatives desk responsible for a $200 million position consisting of inverse floaters, Inverse IO's, PAC IO's and CMO floaters, and provided back-up trading support for IO's, PO's and the PAC PO positions. In addition to her trading duties, she conducted educational seminars to both clients and the sales force on relative

value within mortgage derivatives, and prepared research reports and product guides.

From September 1991 through May 1994, Ms. Borg worked at Merrill Lynch, first as a mortgage research strategist (concentrating on relative value within the mortgage and corporate markets) and then from December 1992 through May 1994, as a trader, specializing in mortgage derivatives, including inverse floaters, inverse IO's, CMO floaters and PAC IO's. In addition to trading these securities, Ms. Borg was responsible for hedging the desk position using mortgage collateral, Treasury bonds and Treasury futures. The average desk derivative position was $300 million.

From September 1989 until September 1991, Ms. Borg worked as a transaction research analyst at Bear Sterns, writing weekly and monthly research reports and conducting weekly educational seminars for the sales force in the areas of corporate securities, swaps, mortgage-backed and asset-backed securities. In addition, she published articles for both clients and internal use on Inverse Floaters, Stripped Mortgage-Backed Securities, PAC IO's and Mortgage-Backed Securities.

Prior to joining Bear Stearns, Ms. Borg worked at Credit Suisse First Boston from June 1981 through April 1989. For the first seven years, she worked as a vice president in the fixed income research department writing mathematical models to value fixed income

futures and options, option adjusted spread models for fixed and adjustable rate mortgages, modeling prepayments for adjustable rate mortgages, structuring and analyzing more complicated CMO structures and writing monthly research reports on relative value within the fixed income markets. In addition, Ms. Borg wrote mathematical models to analyze complex equity options and corporate bonds.

Ms. Borg is the author of numerous book chapters and articles on CMO and mortgage-backed securities, including "Inverse IO's as Fixed Rate Floors", January 1995; "Two-Tiered Inverse Bonds", August 1993; "Inverse Floating Rate CMOs", Handbook of MBS, Fabozzi, 1992; "PAC IO's", Handbook of MBS, Fabozzi, 1992; "Stripped Mortgage-Backed Securities", Secondary Mortgage Market, Lederman, 1993; "The Valuation of Adjustable Rate Mortgages", Handbook of MBS, Fabozzi, 1988.

Ms. Borg received her B.S. from Downstate Medical Center College of Health Related Professions, attended N.Y.U. Graduate Center of Arts and Sciences for a P.H.D. in Mathematics and received an M.B.A. from N.Y.U. Graduate School of Business in Finance and Economics.

Appendix E

Publications

Ms. Borg is the author of numerous book chapters and articles on CMOs and mortgage-backed securities, including:

"Inverse IO's as Fixed Rate Floors", January 1995;

"Two-Tiered Inverse Bonds", August 1993;

"Inverse Floating Rate CMOs", Handbook of MBS, Fabozzi, 1992;

"PAC IO's", Handbook of MBS, Fabozzi, 1992;

"Stripped Mortgage-Backed Securities", Secondary Mortgage Market, Lederman, 1993; "The Valuation of Adjustable Rate Mortgages", Handbook of MBS, Fabozzi, 1988.

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Supreme Court, U.S.
FILED
JAN 19 2010
OFFICE OF THE CLERK

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 23, 2009
CERTIORARI GRANTED NOVEMBER 30, 2009

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An international financial services group

Annual Report 1999

National

National Australia Bank Limited ABN 12 004 044 937

SA-1

BEST AVAILABLE COPY

Description of Business

Introduction

National Australia Bank Limited (hereinafter referred to as 'the National' or 'the Company') is an international financial services group providing a comprehensive and integrated range of financial services across four continents and 15 countries. Globally, at September 30, 1999 the National had:

- Total assets of over $250 billion
- Over $400 billion in assets under administration
- More than 9 million customers

Today, the National is the largest financial services institution listed on the Australian Stock Exchange and ranks among the world's 40 largest banks in terms of shareholders' equity.

The Company began in Melbourne in 1858 as The National Bank of Australasia. In its current form, the National is the result of a merger in 1981 of The National Bank of Australasia Limited and The Commercial Banking Company of Sydney Limited.

From its Australian base, the National has expanded through acquisition overseas into those markets where it believes it can implement its successful financial services strategies. This diversification has reduced the National's reliance on any one market and improved the quality of its income streams. At September 30, 1999, 69.7% of the National's total assets were domiciled in Australia, the balance were located in Europe (United Kingdom and Republic of Ireland, 23.1%), United States (12.9%), New Zealand (9.5%) and Asia (4.8%).

Vision and Strategy

The National is focused on building a leading international financial services group. With the assistance of a global business model, this vision is being pursued through a strategy of controlled growth and diversification of income streams.

The Group's growth strategy is being achieved through a mixture of organic expansion and acquisition within its core markets of Australia, New Zealand, the United Kingdom, Ireland, the United States and Asia. Organic growth has been achieved through the National's Business, Personal and Wholesale financial service franchises supported by a strong customer orientation and brand position. This growth has been further supported by the development of the National's financial services activities, including life and other insurance products, funds management, custodian and trustee operations.

The National's acquisition strategy has generally been aimed at enhancing the Group's position within its chosen markets through the purchase of retail banks with strong retail customer franchises. More recently the strategy has also focused on building key capabilities and developing critical mass in selected financial services activities through acquisitions and internal growth. The National's ability to participate in further rationalisation of the banking industry in Australia has been constrained to date by the prohibition of the merger of major banks in Australia by the Commonwealth Government. In the event that such Government policy changed it would be part of the National's strategy to seek to extend its position in Australia through acquisition or merger at an appropriate time.

The Group has also been actively diversifying its income streams to reduce its reliance on interest income. Improved cost recovery of traditional banking services and an expansion of other financial services activities have been the principal contributors to the increase in other operating income. As a result of these efforts, for the twelve months ended September 30, 1999, 42.9% of operating income was derived from non-interest sources.

The National's Business Model

In April 1998, the National introduced a new business operating model to accelerate its transition to an international financial services group and assist in achieving its vision. The key strength of this operating model is that it will enable the National to sharpen its customer focus while gaining greater leverage from the National's international operations. The National's business operating model has four key elements:

Integrated Retailers

The integrated retailers represent the National's customer facing functions. This element of the model requires the National's customer service activities to operate along customer segment rather than geographic lines. Each business segment is then dedicated to meeting the needs of that customer segment with a range of products sourced from both inside and outside the organization. The integrated retailers are the responsibility of the Business and Personal Financial Services Division.

Product Specialists

Product specialists manage the end to end processes of selected product sets on a global basis. Managing independent business units focused on single products is intended to enable the National to improve efficiency through increased specialisation and scale. Ultimately, the National's product specialists are aiming to deliver world class levels of efficiency in product manufacture and distribution.

Shared Customer Services

Shared customer services centralise common business unit functions such as technology, operations, processing and telephone banking. Through the specialisation of functions and the removal of duplication, substantial opportunities exist to improve efficiency.

Principal responsibility for developing and managing the National's Product Specialist and Shared Services activities is the responsibility of the Global Products and Services Division.

Corporate Centre

A streamlined corporate office focuses on the National's strategy, policy and corporate governance.

Implementation of the National's business model progressed during the year. Key organisational changes have been completed and the National is currently executing the strategies necessary to achieve global scale.

In April 1998, the National announced a restructuring to prepare the National for the implementation of the business model. For the year ended September 30, 1998 a charge of $680 million after tax was made in respect of the restructuring. At September 30, 1999

Trade Finance

International and Business Finance comprises two separate business units delivering sales, processing, settlement and finance services for import and export trade and invoice discounting and factoring.

The business provides value added financial services to internal and external customers and has significant market share in the areas where it operates.

National Services Information Technology Enterprises (NSITE)

The largest of the National's shared services activities is the National's global technology operations. NSITE is responsible for the majority of the National's technology infrastructure, software, support and technology research and development and employs approximately 2,373 staff (or 2,256 full time equivalent positions) across all of the National's operating regions.

As with all of the shared services operations, NSITE is responsible for driving greater value and improving the efficiency of what is one of the largest cost components of any financial service company.

For a description of the National's Year 2000 Readiness see pages 66 to 69 under the Management Discussion and Analysis.

Global Wholesale Financial Services

The National's wholesale activities are conducted through a dedicated division called Global Wholesale Financial Services (GWFS). This division combines the management of the National's capital markets, corporate banking, foreign exchange, money market and project and structured finance operations into a single strategic business unit.

GWFS trades securities, underwrites and arranges facilities for major corporate clients and engages in interest rate and cross currency swap transactions. In the Australian money market, the National is a major trader of bill acceptances. It also operates in the financial futures market as principal and trader.

GWFS is focused on managing the National's relationships with corporate and institutional customers in addition to providing market-making activities in traditional treasury products. GWFS also supports the National's retailing operations with foreign currency and interest rate risk management products designed for the custom and rural business segment.

GWFS operations are maintained in Australia and New Zealand, with branches in London, New York, Hong Kong, Singapore, Tokyo, Seoul, Labuan, Bangkok, and Taipei and through representative offices maintained in Beijing, Kuala Lumpur, Jakarta, New Delhi and Mumbai.

International Banking Relations is a division within GWFS managing the National's banking relationships with approximately 3,000 correspondent banks. These relationships enable the National to provide a comprehensive range of services across the globe.

GWFS manages the National's Asian network providing a range of international trade finance and treasury services, primarily to companies which participate in trade flows between Asia and the National's key markets of Australia, New Zealand, United Kingdom, Republic of Ireland and the United States.

Asian Operations

From its regional headquarters in Hong Kong, National Australia Bank Asia operates seven branches and four representative offices in the major Asian business capitals. A full time equivalent staff of 291 is employed in the Asian region.

HomeSide

On February 10, 1998 the National acquired HomeSide International, Inc. (HomeSide), one of the largest originators and servicers of mortgages in the United States.

Based in Jacksonville, Florida, HomeSide was formed from the merger of the mortgage operations of the Bank of Boston and Barnett Banks in a transaction designed to create the necessary scale to remain competitive in the highly efficient United States mortgage processing business. HomeSide's strength is its exclusive focus on the mortgage process, from originating loans and collecting repayments through to the creation of mortgage backed securities, which are sold in the secondary market.

In collecting mortgages from a variety of sources, HomeSide has established preferred partnership agreements with Bank of Boston, Bank One and Peoples Bank. HomeSide expanded its relationship with Bank One in March 1999 to include the servicing of First Chicago NBD Mortgage Company's US$18 billion mortgage loan portfolio. These agreements provide HomeSide with a strong source of originations without the need to maintain a costly distribution network.

In addition, HomeSide has also entered into a strategic alliance with Cendant Mortgage in June 1999 which agreed to sell HomeSide up to US$7 billion in mortgages annually.

As at June 30, 1999 HomeSide was the 8th largest originator and the 6th largest servicer of mortgages in the United States and by industry standards is considered one of the most efficient operators in the mortgage market.

A program is well progressed to apply HomeSide's processing systems and procedures in Australia and is assessing opportunities in Europe.

Other activities

The National undertakes a number of specialized business activities through other subsidiaries and business units. These include a property company (NBA Properties Limited) which, with its property owning subsidiary companies, is primarily an owner of the Group's business related properties and custodian services.

Other Operating Income

1999	*$4,563 million*
1998	*$3,953 million*
1997	*$2,909 million*

Other operating income includes loan fees from banking, money transfer fees, net mortgage servicing fees, trading income, foreign exchange income, income from wealth creation activities, fees and commissions and other income including rental income, dividends received and profit on sale of fixed assets.

Other operating income increased by $6.0 million or 15.4% in 1999 after an increase of 35.9% in 1998. Exchange rate movements during 1999 reduced other operating income by $9 million. In 1998 exchange rate movements added $293 million to other operating income. The 1999 year reflects a full year's contribution from HomeSide with mortgage origination revenue and servicing fees increasing $213 million. Another important revenue source during 1999 was income from treasury operations, the contribution from which increased 26.9% during the year. Loan fees from banking grew 14.8% due to increased banking activity and higher volumes resulting in increased fee and commission income of 15.2%.

As a result of this growth, 42.9% of net income was derived from non-interest sources for the 1999 year (1998: 40.3%). The change in income mix demonstrates the success the Group has been able to achieve to date in its strategy of diversifying the income base to provide greater stability in income streams.

Loan Fees from Banking

1999	*$1,077 million*
1998	*$938 million*
1997	*$791 million*

Loan fees from banking primarily consist of acceptance fees, which are charged for accepting bills of exchange, application fees charged to cover costs of establishing lending facilities, commitment fees charged to compensate for undrawn funds set aside for a customer's ultimate use and service fees to cover costs of maintaining credit facilities.

Loan fees from banking in 1999 increased by $139 million or 14.8% after increasing 18.1% in 1998. The increase in 1999 reflects increased activity across all geographic regions. In Australia, strong growth was recorded in bill acceptance fees.

Money Transfer Fees

1999	*$1,030 million*
1998	*$1,050 million*
1997	*$863 million*

Money transfer fees are fees earned on the transfer of monies between accounts and/or countries and include fees for bank cheques and telegraphic transfers, dishonours and special clearances and periodical payments.

Money transfer fees in 1999 decreased by $20 million or 1.9% after increasing 23.1% in 1998. The reduction reflects the migration of customers to lower cost electronic distribution channels.

Net Mortgage Servicing Fees

1999	*$312 million*
1998	*$197 million*

Following the acquisition of HomeSide in February 1998, the Group derives fees from mortgage servicing. Net mortgage servicing fee income represents fee income derived from mortgage servicing activities less amortisation of capitalised cost. Refer to Note 1 to the financial statements for more details.

Net Mortgage Servicing Fees in 1999 increased by $115 million or 58.4% over 1998, reflecting a full year's contribution from HomeSide compared to 8 months in 1998 and higher volumes from strategic alliances entered into during 1999.

Net Mortgage Origination Revenue

1999	*$224 million*
1998	*$126 million*

Following the acquisition of HomeSide in February 1998, the Group derives fee income from mortgage origination and selling activities. Net mortgage origination revenue is comprised of fees earned on the origination of mortgage loans, gains and losses on the sale of loans, gains and losses resulting from hedges of secondary marketing activity and fees charged to review loan documents for purchased loan production.

Net Mortgage Origination Revenue in 1999 increased by $98 million or 77.8% over 1998, reflecting a full year's activity, compared to 10 months in 1998, and higher production volumes.

Fees and Commissions

1999	*$955 million*
1998	*$829 million*
1997	*$650 million*

Fees and commissions consist of fees charged to cover the costs of establishing credit card facilities and commissions earned from the provision of insurance and financial services activities.

Fees and commissions income increased by $126 million or 15.2% in 1999 after increasing 27.5% in 1998. The increase in fee and commission income is due primarily to higher personal insurance income and credit card fees related to growth in volumes.

Trading Income

1999	*$457 million*
1998	*$360 million*
1997	*$269 million*

Trading income includes all realised and unrealised profits and losses resulting directly from foreign exchange trading activities, trading securities and interest rate related derivative trading activities. Trading income increased by $97 million or 26.9% in 1999 after increasing by 33.8% in 1998.

Other Income

1999	*$508 million*
1998	*$453 million*
1997	*$343 million*

Other income includes rental income, dividends received, profit on sale of fixed assets, foreign exchange income and sundry other income.

Other income increased by $55 million or 12.1% after increasing by 32.1% in 1998. The 1998 year included higher dividend income, the impact of which was partly offset, in 1999, by gains on disposal of investments.

Other Operating Expenses (Excluding Goodwill Amortisation and Abnormal Items)

1999	*$5,747 million*
1998	*$5,135 million*
1997	*$4,477 million*

In 1999 other operating expenses, including personnel, occupancy and other general expenses (but excluding goodwill amortisation and abnormal items) increased $407 million or 7.9% over 1998. This compares with an increase of 19.2% in 1998.

Expenses were impacted by the inclusion of the first full year results for HomeSide, and a number of one-off factors including the cessation of the superannuation holiday in Australia, restructuring costs (in 1998 restructuring costs were included as abnormal items) and an adjustment to the residual value of operating leased vehicles reflecting the prospective impact of Australian Goods and Services Tax. When these factors are excluded expenses increased by 3.6%.

Other Operating Expenses (Excluding Goodwill Amortisation and Abnormal Items) (continued)

The movement in expenses resulted from:

- personnel costs increasing $231 million or 7.6% in 1999 after increasing 15.6% in 1998,
- occupancy costs increasing $18 million or 3.8% in 1999 after increasing 10.3% in 1998, and
- general expenses (excluding goodwill amortisation) increasing $158 million or 8.7% in 1999 after increasing 28.6% in 1998

Personnel costs for the September 1999 quarter increased by $32 million or 4.0% compared with the previous quarter, largely due to restructuring costs in Australia and market based remuneration increases in Australia, effective 1 July, 1999.

For the year to September 1999, the underlying increase in salaries was 0.9%. Total personnel costs are 7.6% higher than the year to September 1998 of which 2.5% is attributable to the full year impact of HomeSide. The 1999 year includes a charge for restructuring in Australian of $30 million. In 1998, restructuring costs were treated as abnormal items. The remaining increase of 4.1% reflects increased long service leave charges and superannuation contributions.

Occupancy costs for the year to September 1999, increased 3.8%, of which a full year of HomeSide's costs accounts for 1.6% with the balance attributable to higher rental expense resulting from the sale and leaseback activities in Australia and Europe partly offset by reduced depreciation.

General expenses rose 8.7% compared with the year to September 1998. Of the increase, HomeSide accounted for 1.5% with the balance attributable to higher teleprocessing and communication costs ($36 million) and an adjustment to the residual value of leased vehicles ($18 million). These increases were partially offset by the impact of software capitalisation from 1 October, 1998.

The Group's cost to income ratio was 54.0% in 1999 compared to 54.4% (excluding abnormal items) in 1998. Cost to income ratio details (excluding restructuring costs in 1998 which were classified as abnormal items) for the key business units are provided in the table below.

Refer to Note 2 to the financial statements for details of income and expense items.

For years ended September 30	*1999*	*1998*	*1997*	*1996*	*1995*
Dollars in Millions, except percentages					
Australian Financial Services					
Other operating expenses[1]	2,501	2,291	2,098	1,991	2,073
Operating income[2]	4,928	4,617	4,201	4,013	3,961
%	50.8	49.6	49.9	49.6	52.3
Clydesdale Bank					
Other operating expenses[1]	550	518	415	400	438
Operating income[2]	1,147	1,037	777	697	717
%	48.0	49.9	53.4	57.4	61.1
Northern Bank					
Other operating expenses[1]	243	237	207	183	213
Operating income[2]	506	491	389	346	345
%	48.0	48.3	53.2	53.2	61.7
National Irish Bank					
Other operating expenses[1]	127	114	88	82	86
Operating income[2]	181	172	141	131	131
%	70.2	66.3	62.4	62.6	65.6
Yorkshire Bank					
Other operating expenses[1]	571	576	484	464	487
Operating income[2]	1,172	1,141	940	864	860
%	48.7	50.5	51.5	53.7	56.6
Bank of New Zealand					
Other operating expenses[1]	476	506	501	513	509
Operating income[2]	837	885	895	852	816
%	56.9	57.2	56.0	60.2	62.4
Michigan National Corporation					
Other operating expenses[1]	474	472	365	320	–
Operating income[2]	891	844	668	578	–
%	53.2	55.9	54.6	55.4	–
HomeSide					
Other operating expenses[1]	386	217	–	–	–
Operating income[2]	640	387	–	–	–
%	60.3	56.1	–	–	–
Group					
Other operating expenses[1]	5,742	5,435	4,427	4,229	3,946
Operating income[2]	10,629	9,811	8,267	7,761	6,970
%	54.0	54.4	54.2	54.5	56.6

[1] Excluding Restructuring costs in 1998 [illegible]

[2] Represents Net Interest Income plus Other Operating Income

Operating Profit After Income Tax (continued)

For years ended September 30	1999	1998	1997	1996	1995	Average Compound Growth %
Dollars in Millions						
Operating profit						
(after tax and outside equity interest and before abnormal items)	2,821	2,514	2,223	2,102	1,936	9.9
Abnormal items		(749)	–	–	33	
Income tax expense	1,321	1,211	1,095	959	906	9.9
Operating profit (before tax after outside equity interest)	4,142	2,976	3,318	3,061	2,875	9.6

Adjusted to Accord with US GAAP

Prepared in accordance with US GAAP consolidated net income for the year to September 30, 1999 was $2,852 million compared to $2,099 million in 1998 and $2,289 million in 1997. There were no individually material adjustments between US GAAP net income and Australian GAAP net profit for the years ended September 30, 1999, 1998 and 1997. See Note 49 to the financial statements for a detailed reconciliation of Australian GAAP net profit to US GAAP net income.

Underlying Profit

Underlying profit shows the growth in the core business of the organisation, and provides an indication of its capacity to absorb current and possible future bad debt charges.

For years ended September 30	1999	1998	1997	1996	1995
Dollars in Millions					
Operating profit before tax, doubtful debt expense and goodwill amortisation	4,887	4,476	3,790	3,532	3,094
Goodwill amortisation	(206)	(181)	(142)	(137)	(92)
Underlying Profit	4,681	4,295	3,648	3,395	2,962
Deduct					
Charge to provide for doubtful debts	(540)	(572)	(532)	(333)	(116)
Income tax expense	(1,321)	(1,211)	(1,095)	(959)	(906)
Operating profit before abnormal items and outside equity interests	2,820	2,512	2,221	2,103	1,940
Add/(Deduct) abnormal items (after tax)	–	(497)	–	–	33
Operating profit after income tax before outside equity interest (per Statements of Profit and Loss)	2,820	2,015	2,221	2,103	1,973

Operating Profit By Segments

Contributions to Consolidated Operating Profit by Major Operating Segments

In April 1998, the Group introduced a new business operating model, designed to leverage its global scale while improving its customer focus. The Group's business is organised into five major operating segments based on similar products and services provided globally to customers or activities undertaken solely for the Group's own account, and managed by individuals who report directly to the Chief Executive Officer.

The major operating segments are:

- Business & Personal Financial Services
- Products and Services
- Global Wholesale Financial Services
- Home Side, and
- Information Technology.

Refer to Note 55 to the financial statements for further detail on the Group's major operating segments as at 30 September.

The following table shows the contribution by each of the major operating segments to the National's consolidated operating profit after tax. The contribution from these operating segments is after intersegment revenue and expense charges.

As the Company believes it is appropriate to provide prior year comparative information for the operating segments used by management during 1999, the discussion on the results of 1999 performance is based on the segmentation adopted in previous periods.

For years ended September 30	1999
Dollars in Millions	
Operating Segments:	
Business and Personal Financial Services	2,130
Products and Services	69
Global Wholesale Financial Services	591
HomeSide	153
Information Technology	(37)
All Other	(45)
Operating Profit after Tax and Outside Equity Interests	2,921

Contributions to Consolidated Operating Profit by Major Business Areas

During 1999, the Group's operating profit after income tax increased 40.1% to $2,821 million after decreasing by 9.4% to $2,314 million in 1998 (after abnormal items) and increasing by 5.8% to $2,223 million in 1997. The 1998 result included abnormal items of $497 million after tax. There were no abnormal items in 1999. Excluding the effect of abnormal items, operating profit after tax grew by 12.3% in 1999 to $2,821 from $2,511 million in 1998.

The 1999 result reflects strong growth in lending and the benefits of the Group's income diversification deriving from a broad geographic and business spread, operating efficiency and risk management.

The Group's international operations contributed $1,409 million in 1999 or 49.9% of the operating profit after tax compared to 47.2% in 1998. This compares with five years ago when the Group only derived 27.4% of the profit after tax from operations outside Australia.

For years ended September 30	1999	1998	1997	1996	1995
Dollars in Millions					
Australian Group:					
Australian Financial Services [1]	1,435	1,403	1,297	1,239	1,167
Other [2]	(12)	(81)	32	209	229
Less: Goodwill amortisation	(11)	(6)	–	–	–
Abnormal items (after tax)	–	(253)	–	–	33
Total Australian Group	1,412	1,063	1,329	1,448	1,429
European Group:					
Clydesdale Bank	262	286	211	162	164
Northern Bank	171	169	119	97	80
Yorkshire Bank	343	346	227	159	190
National Irish Bank	31	32	33	27	25
National Australia Life	10	9	5	(9)	(35)
Other [3]	5	(62)	(45)	(55)	(4)
Less: Goodwill amortisation	(62)	(62)	(62)	(62)	(62)
Abnormal items (after tax)	–	(236)	–	–	–
Total European Group	761	477	488	341	358
New Zealand Group:					
Bank of New Zealand	298	280	277	241	238
NAG(NZ)	(27)	(42)	(49)	(49)	(47)
Less: Goodwill amortisation	(31)	(31)	(31)	(31)	(30)
Abnormal items (after tax)	–	(18)	–	–	–
Total New Zealand Group	240	89	197	161	161
United States Group:					
Michigan National Corporation	264	226	222	156	–
HomeSide	153	92			–
Other [3]	71	(7)	8	17	3
Less: Goodwill amortisation	(102)	(82)	(49)	(44)	–
Abnormal items (after tax)	–	15	–	–	–
Total United States Group	376	242	181	129	3
Asian Group:					
Asian Branches	22	34	18	14	9
Other [3]	10	12	10	4	4
Less: Abnormal items (after tax)	–	(3)	–	–	–
Total Asian Group	32	43	28	18	13
Operating Profit after Tax and Outside Equity Interests	2,821	2,014	2,223	2,102	1,964

[1] *Australian Financial Services includes Personal Banking, Business Banking, Wholesale Banking, National Australia Financial Management Limited, National Australia Asset Management Limited, the Australian Property Companies, Custom Service Leasing Limited, National Australia Trustees Limited, Global Securities Services, County Investment Management Limited, ARDIB Limited, National Australia Investment Capital Limited, Australian Market Automated Quotation (Ausmaq) System Limited and Aloe Corporation Pty Limited. Corporate centre costs and National Equities Limited have been excluded from the Australian Financial Services figures.*

[2] *Australian Other includes National Equities Limited, Corporate Centre and HomeSide Lending (formerly BNZ Australia) (prior to HomeSide Lending becoming part of Australian Financial Services' operations in June 1997).*

Europe Other includes National Australia Group (Europe) Limited, London Branch, NAB Investments Limited and NAB Treasury (Ireland) Limited.

[3] *US Other includes New York Branch, National Australia Funding (Delaware), Inc., National Americas Investments, Inc. and Homeside Investments, Inc.*

[4] *Asia Other includes Nasdaq Insurance Pte Limited.*

Operating Profit by Major Business Areas

Australian Financial Services

Australian Financial Services includes Personal Banking, Business Banking, Wholesale Banking, National Australia Financial Management Limited, National Australia Asset Management Limited, the Australian Property Companies, Custom Service Leasing Limited, National Australia Trustees Limited, Global Securities Services and County Investment Management Limited and National Australia Investment Capital Limited. Corporate centre costs and National Equities Limited have been excluded from the Australian Financial Services figures.

Australian Financial Services produced a steady result with operating profit after tax (before goodwill amortisation and abnormal items) increasing by $37 million or 2.3% to $1,435 million in 1999 from $1,403 million in 1998 and $1,297 million in 1997. The cost income ratio increased during the period from 49.6% to 50.8%, reflecting higher teleprocessing costs and commissions from the migration of customers to new distribution channels and an adjustment to the carrying value of leased vehicles.

Net interest income increased by $94 million or 3.4% in 1999. Higher volume growth offset strong competitive pressure on lending margins and change in product mix. Net interest margin for 1999 was 3.01% compared to 3.10% for 1998.

Other operating income showed strong growth increasing by $217 million or 11.5% due to volume related growth in fee income and higher income from treasury activities. The increase in treasury income reflects the introduction of new products together with increased volumes.

Other operating expenses increased by 9.2% during 1999. Contributing to the increase was an adjustment to the carrying value of leased vehicles, higher teleprocessing costs and commissions reflecting the change in distribution channels, higher personnel on-costs (such as long service leave and superannuation) and restructuring charges. In 1998, restructuring charges were included as abnormal items. The underlying increase in salary expenses was 1.6%.

National Australia Financial Management Limited (NFM) produces protection income, superannuation, investment trust and retirement income products for retail clients. NFM contributed a profit of $67 million, a 7.5% increase over the corresponding period in 1998. The result reflects strong growth in all major product lines and an 18% increase in retail funds under management to $6.9 billion.

National Australia Asset Management Limited (NAM) is a full-service fund manager, managing NFM's retail products portfolio and a portfolio of wholesale assets and funds for institutional clients. NAM's profit contribution increased from $3.0 million for 1998 to $3.8 million in 1999 year.

County Investment Management Limited (County) is a specialist fund manager, managing a range of products from funds and portfolios for institutional clients to retail and wholesale trust products. County became a member of the National Australia Bank Group on October 1, 1997. County contributed a profit of $4.4 million in 1999 consistent with the 1998 year. Funds under management grew by 14.2% during the 1999 year to $12.0 billion.

Total funds under management of NFM, NAM and County increased over the year by $3.0 billion to $20.7 billion as at September 30, 1999.

National Australia Investment Capital Limited (NAIC) was established in March 1996 to provide equity and quasi equity finance to small to medium sized private and public enterprises. NAIC contributed a profit of $10.3 million, as a result of the sale of investments, compared with a loss of $7.0 million in 1998.

European Group

The European Group comprises the National's UK operations and National Irish Bank based in the Republic of Ireland. The European Group profit contribution (before goodwill amortisation and abnormal items) increased by 6.2% to $823 million from $775 million in 1998 and $550 million in 1997.

The contributions from each of the European entities was impacted by the realignment of the statistically determined general provision, adopted in 1998, between Europe Other and the individual Banks. The impact on each entity's contribution after tax was as follows: Clydesdale Bank (a charge of $35 million), Northern Bank (a credit of $8 million), Yorkshire Bank (a charge of $6 million), National Irish Bank (a charge of $2 million) and Other Europe (a credit of $51 million). The overall impact was a net reduction in operating profit after tax of $4 million.

The major factors contributing to the European result were:

- higher net interest income of $122 million, up 6.8% over 1998, reflecting strong growth in lending particularly housing loans in Clydesdale and Yorkshire banks;
- other operating income grew by $95 million, or 8.8%, to $1,176 million predominantly volume related increases in lending and money transfer fees and gains on sale of property;
- increased other operating costs caused by on-going investigations at National Irish Bank and higher advertising and marketing expenses across the Banks; and
- increase in charge for doubtful debts of $56 million, reflecting a number of specific provisions raised during the year in Clydesdale Bank, a change in the mix of the loan book at Yorkshire Bank and increased lending volumes.

Clydesdale Bank's profit before abnormals decreased by 8.4% (7.9% in local currency) to $262 million in 1999 from $286 million in 1998 and $211 million in 1997. The Clydesdale result was impacted by a higher doubtful debts charge reflecting a number of new specific provisions raised during the 1999 year, increased lending volumes and a refinement of the statistically based methodology, introduced in 1998, for calculating the general provision (as described above).

Yorkshire Bank's profit was $343 million, steady compared with 1998 of $344 million (before abnormal items), and 31.5% higher than 1997 of $227 million. Yorkshire's result was impacted by a higher charge for doubtful debts due to an increase in general provisions which rose partly from a change in the loan book and partly from a refinement of the statistically based methodology, introduced in 1998, for calculating the general provision (as described above).

Northern Bank's profit increased by 1.2% (1.8% in local currency) to $171 million from $169 million in 1998 (before abnormal items) and $119 million in 1997.

National Irish Bank's profit was $31million in 1999, $37 million in 1998 and $33 million in 1997.

National Australia Life contributed a profit of $10 million in 1999 up from $5 million in 1998 and 1997.

New Zealand Group

The New Zealand Group contributed a profit after tax (before goodwill amortisation and abnormal items) of $271 million compared to $238 million in 1998, an increase of 13.9%.

Bank of New Zealand (BNZ), (including its offshore operations), contributed a profit of $298 million in 1999 compared to $280 million in 1998, an increase of 6.4%. The profit increase reflects higher other operating income partly offset by the impact of lower margins. The 1999 result also benefited from a lower tax rate due to a number of tax effective financing transactions.

Net interest income fell by 14.9% during the 1999 year to $498 million. The impact of strong lending growth was more than offset by lower margins. BNZ's net interest margin declined from 2.7% to 2.1% during the 1999 year, reflecting a lower interest rate environment impacting retail deposit margins.

Other operating income rose by $39 million from $300 million to $339 million, due to growth in treasury related income and higher insurance and credit card fee income. Higher credit card fee income reflects the introduction of new products and loyalty programs.

Other operating expenses decreased 5.9% from $506 million in 1998 to $476 million in 1999 reflecting lower FTE numbers and lower information technology costs.

United States Group

The United States Group contributed a profit after tax of $478 million (before goodwill amortisation of $102 million) compared to $311 million (before goodwill amortisation of $82 million and abnormal items of $13 million) in 1998, an increase of 53.7%.

MNC contributed a profit of $254 million in 1999 compared to $226 million in 1998, an increase of 12.4%. Net interest income increased by 6.0% with higher volumes and interest recoveries more than offsetting tightening margins. Other operating income grew by 4.5% reflecting volume growth in lending fees, increased syndication income and money transfer fees. MNC's cost to income ratio improved from 55.9% in 1998 to 53.2% in 1999 due to higher income and steady other operating expenses.

HomeSide, which was acquired on February 10, 1998, contributed a profit of $153 million compared to $92 million in 1998, an increase of $61 million or 66.3% reflecting a full year's operation.

Asian Group

The contribution from the Asian operations decreased from $46 million (before abnormal items) for 1998 to $32 million in 1999. However, the results for both 1998 and 1999 were affected by the translation of the Group's investment in its integrated Asian operations. Excluding the translation component for both years, the underlying 1999 result for Asia showed a significant increase from the previous year. The 1999 result reflects strong performance from treasury activities and increasing consumer and business confidence.

Balance Sheets

As at September 30 Dollars in Millions	Note	Consolidated 1999	1998	1997	The Company 1999	1998	1997
Assets							
Cash and short-term liquid assets	7	3,649	4,132	4,454	928	1,519	1,396
Due from other financial institutions	8	11,120	9,303	10,360	7,516	5,465	7,770
Due from customers on acceptances	9	22,851	22,353	19,605	21,903	21,371	18,888
Trading securities	10	12,853	11,446	9,987	11,761	9,394	8,182
Available-for-sale securities	11	1,399	937	1,815	1,211	749	1,642
Investment securities	12	8,951	8,228	7,448	5,598	5,341	5,082
Loans and advances	13	165,620	160,001	131,036	91,103	82,924	71,817
Mortgage loans held for sale		1,980	3,473	–	–	–	–
Mortgage servicing rights	16	5,345	2,998	–	–	–	–
Due from controlled entities		–	–	–	22,684	20,745	14,920
Shares in entities and other securities	17	1,068	1,013	280	5,463	5,383	3,522
Regulatory deposits	18	153	1,155	1,016	6	961	867
Fixed assets	19	2,032	2,219	2,229	575	544	573
Goodwill	20	2,905	3,095	2,122	–	–	–
Other assets	21	14,155	21,341	11,617	8,539	13,688	8,189
Total Assets		254,061	251,714	201,969	177,287	168,081	142,828
Liabilities							
Due to other financial institutions	22	16,203	16,541	12,746	13,304	11,675	11,178
Liability on acceptances	9	22,851	22,353	19,605	21,903	21,371	18,888
Deposits and other borrowings	23	162,468	158,084	138,469	94,128	84,739	70,250
Income tax liability	24	1,979	1,953	1,629	856	756	606
Provisions	25	1,743	1,680	1,292	1,361	1,182	989
Due to controlled entities		–	–	–	13,032	13,313	11,890
Bonds, notes and subordinated debt	26	13,437	15,115	9,569	11,287	12,735	9,439
Other debt issues	27	1,645	1,583	1,509	383	421	347
Other liabilities	28,29	15,235	18,541	14,469	8,959	12,174	10,270
Total Liabilities		235,561	235,950	189,988	165,113	158,366	134,027
Net Assets		18,520	15,764	12,581	12,174	9,715	8,821
Shareholders' Equity							
Issued and paid-up capital	30	9,286	6,575	1,413	9,286	6,675	1,613
Reserves	30	802	1,782	4,398	207	206	4,232
Retained profits		8,432	7,304	6,568	2,681	2,834	3,177
Shareholders' equity attributable to members of the Company		18,520	15,761	12,379	12,174	9,715	8,821
Outside equity interests in controlled entities	31	–	3	2	–	–	–
Total Shareholders' Equity		18,520	15,764	12,381	12,174	9,715	8,821

Contingent liabilities and commitments are excluded from the Balance Sheets and are listed in Notes 29, 38, 39, 41 and 43.

The Balance Sheets are to be read in conjunction with the notes to the financial statements set out on pages 44 to 164.

Mortgage Servicing Rights

Mortgage servicing rights are the rights to receive a portion of the interest coupon and fees collected from the mortgagor for performing specified servicing activities. The total cost of loans originated or acquired is allocated between the mortgage servicing rights and the mortgage loans without the servicing rights, based on relative fair values. The value of servicing rights acquired through bulk transactions is capitalised at cost.

Mortgage servicing rights are amortised in proportion to and over the period of estimated net servicing revenue. They are evaluated for impairment by comparing the carrying amount of the servicing rights to their fair value. Fair value is estimated using market prices of similar mortgage servicing assets and discounted future net cash flows considering market prepayment rates, historic prepayment rates, portfolio characteristics, interest rates and other economic factors. For purposes of measuring impairment, the mortgage servicing rights are stratified by the predominant risk characteristics which include product types of the underlying loans and interest rates of the mortgage notes. Impairment is recognised through a valuation reserve for each impaired stratum and is included in amortisation of mortgage servicing rights.

Shares in Entities

Shares in entities are stated at original cost less any necessary provision for diminution in value, or at Directors' valuation. Unrealised losses relating to diminution in the value of shares in entities are recognised in the profit and loss account.

Fixed Assets

It is the Consolidated Entity's policy to revalue land and buildings annually to reflect their current market value. The Directors value land and buildings on the basis of open market values, discounted appropriately. Such values are based on advice received from independent valuers and assume existing use, being continuing occupation of properties by the Consolidated Entity, tenancies to external parties, or vacancies, as applicable. All land and buildings are subject to an independent valuation on a three year cycle.

Increments arising from property revaluations are credited to the Asset Revaluation Reserve. Revaluation decrements, being reversals of increments previously credited to, and included in the balance of the Asset Revaluation Reserve are charged against that reserve.

In revaluing land and buildings, the Directors have not taken into account the potential impact of capital gains tax on the grounds that such assets are an integral part of the Consolidated Entity's operations and there is no current intention to sell these assets. In addition, a large proportion of the Consolidated Entity's land and buildings were acquired prior to the introduction of capital gains tax legislation.

All other fixed assets and land and buildings acquired since the last revaluation are carried at the lower of cost, less accumulated depreciation, and recoverable amount.

If the carrying amount of a fixed asset exceeds its recoverable amount, the asset is written down to the lower value. In assessing recoverable amounts, the relevant cash flows have not been discounted to their present value unless otherwise stated.

With the exception of land, all fixed assets are depreciated or amortised by the straight-line method at the rates appropriate to their estimated useful lives to the Consolidated Entity. For major classes of fixed assets, the rates are: buildings – 3.3%, furniture, fixtures and fittings – 10%, PC and related software – 33.3%, and other data processing equipment and related software – 20%.

Profit or loss on the sale of fixed assets, which is determined as the difference between the carrying amount of fixed assets at the time of disposal and the sale proceeds, is treated as operating income or expense. Any Asset Revaluation Reserve amount relating to assets sold is transferred to Retained Profits.

Goodwill

Goodwill, representing the excess of the purchase consideration over the fair value of the identifiable net assets acquired on the date of acquisition of a controlled entity, is recognised as an asset. Goodwill is amortised from the date of acquisition by systematic charges on a straight-line basis against income over the period in which the benefits are expected to arise, but not exceeding 20 years. The carrying value of goodwill is reviewed at least annually. If the carrying value of goodwill exceeds the value of the expected future benefits, the difference is charged to the profit and loss account.

Life Insurance Business

The Consolidated Entity conducts life insurance business through its controlled entities National Australia Financial Management Limited, National Australia Life Company Limited and BNZ Life Insurance Limited.

The Consolidated Entity's interest in the profits of the life insurance statutory funds have been included in the consolidated profit and loss account. The profits have been determined in accordance with the 'Margin on Services' methodology for the valuation of policy liabilities under Actuarial Standard 1.01, 'Valuation of Policy Liabilities' issued by the Life Insurance Actuarial Standards Board. These profits are transferred to the General Reserve until available for distribution under the requirements of the Life Insurance Act (1995) and local statutory accounting practices.

Policyholders' interest in the statutory funds, as disclosed in Note 51, are not included in the consolidated accounts as the Consolidated Entity does not have direct or indirect control of such funds as defined by AASB 1024 'Consolidated Accounts'.

Trustee and Funds Management Activities

The consolidated financial report includes the shareholders' interest in trustee companies, which act as the trustee and/or manager of a number of investments and trusts. These funds and trusts, as disclosed in Note 51, are not included in the consolidated accounts as the Consolidated Entity does not have direct or indirect control of the funds and trusts as defined by AASB 1024 'Consolidated Accounts'. The Trustees hold a right of indemnity against the assets of the applicable funds or trusts for liabilities incurred in their capacity as trustees. As these assets are sufficient to cover the liabilities, the liabilities are not included in the consolidated financial report.

As at September 30 Dollars in Millions	Consolidated			The Company		
	1999	1998	1997	1999	1998	1997

16 Mortgage servicing rights

Opening balance	2,998	–	–	–	–	–
Additions	1,873	4,002	–	–	–	–
Sale of servicing rights	–	(17)	–	–	–	–
Deferred hedge loss/(gain)	1,376	(664)	–	–	–	–
Amortisation	(629)	(323)	–	–	–	–
Foreign Currency Translation Adjustments	(273)	–	–	–	–	–
Total Mortgage Servicing Rights	5,345	2,998	–	–	–	–

Net deferred hedge losses of $758 million consists of prior period net deferred gains of $657 million, current period losses of $1,376 million and $39 million of amortisation recognised as a component of amortisation of mortgage servicing rights. In 1998, net deferred hedge gains of $657 million consisted of gains of $664 million, less $7 million of amortisation recognised as a component of amortisation of mortgage servicing rights.

Maturity Analysis of Mortgage Servicing Rights		
Due after 3 months through to 1 year	2	1
Due after 1 year through to 5 years	60	17
Due after 5 years	5,283	2,980
	5,345	2,998

17 Shares in entities and other securities

Carrying value

Shares in other entities (at cost)	398	326	286	252	249	227
Deduct: Provision for diminution in value	(20)	(18)	(9)	(2)	(2)	(2)
	378	308	277	250	247	225
Shares in controlled entities						
At cost	–	–	–	5,059	4,961	3,112
At Directors' valuation 1987	–	–	–	185	185	185
Deduct: Provision for diminution in value	–	–	–	(31)	–	–
	–	–	–	5,213	5,146	3,297
	378	308	277	5,463	5,393	3,522
Units in unlisted trust (at cost)	690	705	3	–	–	–
Total carrying value of Shares in Entities and Other Securities	1,068	1,013	280	5,463	5,393	3,522

Market value

Shares in other entities	444	406	297	318	333	253
Units in unlisted trust	690	705	3	–	–	–
Total market value of Shares in Entities and Other Securities	1,134	1,111	300	318	333	253

18 Regulatory deposits

Reserve Bank of Australia	3	653	838	3	653	838
Central Banks Overseas	150	202	178	3	8	9
Total Regulatory Deposits	153	855	1,016	6	961	847

Regulatory deposits represent deposits held by the regulatory bodies of the industry in which operations are conducted as a pre-condition for conducting business.

The Directors of the Company are classified as either Executive or Non-Executive, with the former being those Directors engaged in the full time employment of the Company. Mr FJ Cicutto is the only Executive Director.

The aggregate remuneration paid by the Company and its subsidiaries during the year ended September 30, 1999 to all Directors and Executive Officers listed above as a group (24 persons in 1999 and 24 persons in 1998) was $18 million (1998: $18 million).

During the year ended September 30, 1999, Share Options were issued to 531 executives covering a total of 12,565,000 share options as per the Bank's Share Option register. A total of 2,870,000 options were issued to the 15 of the 25 Directors and Officers listed above as a group.

Nature of Trading Market

Ordinary Shares

The Ordinary Shares are listed for trading on the Australian Stock Exchange Limited, a self-regulatory organisation which governs the open market quotation, purchase and sale of the Ordinary Shares in Australia. The Australian Stock Exchange Limited is the principal market for the Ordinary Shares, and operates in the following cities in Australia: Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart. The Ordinary Shares are also listed for quotation on the London Stock Exchange Limited, the London Stock Exchange Automated Quotation System; the Stock Exchange, New Zealand; and the Tokyo Stock Exchange. American Depositary Shares ('ADSs') are listed on the New York Stock Exchange (refer below). The following table sets forth, for the calendar quarters indicated, the high and low sale prices of the Ordinary Shares as reported by the Australian Stock Exchange Limited.

	1999		1998		1997		1996	
	High	Low	High	Low	High	Low	High	Low
March Quarter	$28.85	$24.40	$22.70	$18.93	$17.22	$14.37	$13.01	$11.10
June Quarter	30.28	24.98	23.40	20.55	19.05	15.20	12.10	10.98
September Quarter	25.75	21.61	23.50	19.95	22.85	18.60	13.30	11.17
December Quarter*	23.85	22.23	24.95	18.99	21.95	16.87	15.65	13.15

*The 1999 December quarter represents the period from October 1 to October 22.

On October 22, 1999 the closing price on the Australian Stock Exchange Limited was $22.41 per Ordinary Share, with 1,484,112,319 Ordinary Shares (excluding partly paid shares) outstanding and such shares were held by 284,518 holders.

American Depositary Shares (ADSs)

The Ordinary Shares are traded in the United States in the form of ADSs evidenced by American Depositary Receipts (ADRs) issued by Morgan Guaranty Trust Company of New York, as Depositary (the Depositary), pursuant to a Deposit Agreement dated January 16, 1987, as amended as of June 24, 1988 (the Deposit Agreement). Each ADS represents five Ordinary Shares. The ADSs are listed on the New York Stock Exchange (the 'NYSE'), which is the principal market in the United States for the trading of the ADSs. The ADSs trade on the NYSE under the symbol 'NAB'. At October 22, 1999, 3,254,780 ADSs representing 16,273,900 Ordinary Shares, or approximately 1.1% of the Ordinary Shares outstanding on such date, were held by 300 holders with registered addresses in the United States. The following table sets forth, for the calendar quarters indicated, the high and low sale prices per ADS as reported on the NYSE composite tape.

	1999		1998		1997		1996	
	High	Low	High	Low	High	Low	High	Low
March Quarter	US$90.69	US$76.31	US$73.88	US$65.38	US$66.13	US$56.13	US$49.25	US$44.75
June Quarter	92.69	80.14	76.38	61.25	72.75	60.05	48.25	43.25
September Quarter	83.94	70.13	73.25	59.06	81.25	68.25	53.00	44.25
December Quarter*	77.19	72.50	77.00	57.06	71.00	66.44	62.50	52.50

*The 1999 December quarter represents the period from October 1 to October 22.

On October 22, 1999 the closing price per ADS as reported on the NYSE composite tape was US$73.38.

National Income Securities (NIS)

The National Income Securities were listed for trading on the Australian Stock Exchange Limited, a self-regulatory organisation which governs the open market quotation, purchase and sale of the Equity Instruments in Australia. The Australian Stock Exchange Limited is the principal market for the Equity Instruments, and operates in the following cities in Australia: Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart.

	1999		1998		1997		1996	
	High	Low	High	Low	High	Low	High	Low
September Quarter	$101.60	$100.45	–	–	–	–	–	–
December Quarter*	103.34	122.85	–	–	–	–	–	–

*The 1999 December quarter represents the period from October 1 to October 22.

On October 22, 1999 the closing price on the Australian Stock Exchange Limited was $122.40 per National Income Security, with 20,000,000 National Income Securities outstanding and such Equity Instruments were held by 52,836 holders.

Shareholders of the Bank as at October 22, 1999

	Number of Shares	%
Chase Manhattan Nominees Limited	168,051,854	11.3
National Nominees Limited	102,241,229	6.9
Westpac Custodian Nominees Limited	101,605,552	6.8
ANZ Nominees Limited	51,600,841	3.5
Perpetual Trustee Australia Group	47,887,331	3.2
BT Custodial Services Pty Limited	43,431,278	2.9
Citicorp Nominees Pty Limited	30,630,651	2.1
AMP Group	24,471,829	1.7
Permanent Trustee Group	23,844,472	1.6
Queensland Investment Corporation	23,583,037	1.6
Commonwealth Custodial Services Limited	23,079,069	1.6
National Australia Trustees Limited	14,646,847	1.0
MLC Limited	13,247,280	0.9
Mercantile Mutual Life Insurance Group	9,611,699	0.7
Perpetual Nominees Limited	9,255,220	0.6
HKBA Nominees Limited	7,948,646	0.5
NRMA Group	7,872,890	0.5
AMP Nominees Pty Limited	7,854,631	0.5
Australian Foundation Investment Company Limited	5,939,612	0.4
Invia Custodian Pty Limited	5,830,076	0.4
	722,654,014	48.7

The twenty largest shareholders held 722,654,014 shares which is equal to 48.7% of the total issued capital of 1,484,112,319 ordinary shares.

As at October 22, 1999 there was no person or corporation with a shareholding in excess of 15 per cent of the nominal capital of National Australia Bank Limited.

Distribution of Shareholdings

	Number of Shareholders	% of Holders	Number of Shares	% of Shares
Range				
1 – 1,000	172,337	60.6	71,139,811	4.8
1,001 – 5,000	88,216	31.0	192,191,098	13.0
5,001 – 10,000	14,082	4.9	98,223,316	6.6
10,001 – 100,000	9,398	3.3	201,031,162	13.5
100,001 and over	485	0.2	921,527,932	62.1
	284,518	100.0	1,484,112,319	100.0
Less than marketable parcel	9,690	3.4		
Address of Holders				
Australia	264,356	92.9	1,460,453,006	98.4
United Kingdom	11,729	4.1	7,520,572	0.5
New Zealand	5,780	2.0	10,684,321	0.7
United States	399	0.2	441,259	0.1
Other Overseas	2,254	0.8	5,013,059	0.3
	284,518	100.0	1,484,112,319	100.0

Voting Rights

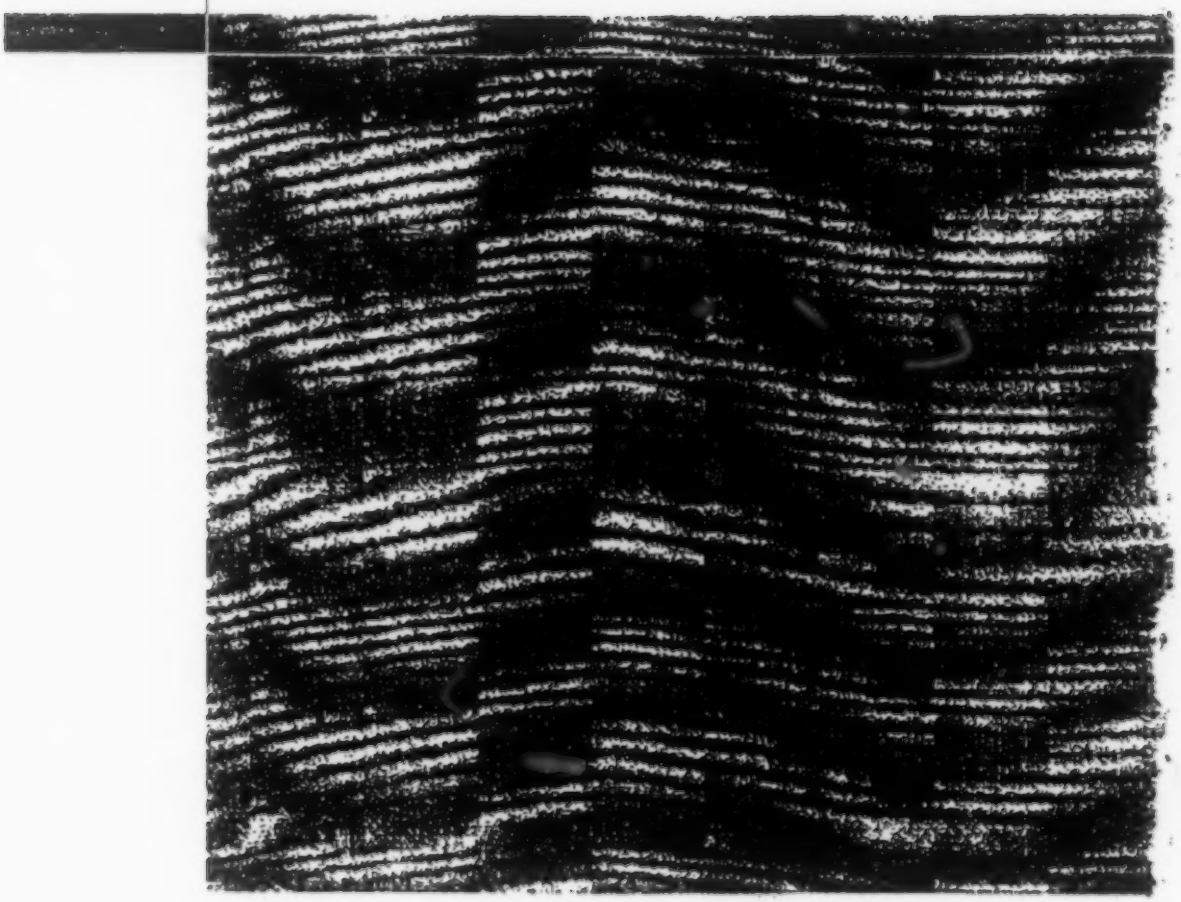
The Banking Company's Constitution provides in summary that every member (and person entitled under Article 6.1, the representative Article) present in person or by proxy, attorney or representative at a general meeting of shareholders shall have one or more votes as follows:

On a show of hands – one vote

On a poll – one vote for each share held.

Where a member appoints two proxies that are to vote in different ways to vote on a resolution, the proxy must not vote on a show of hands.

National



Annual Financial Report 2000

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Description of business

Introduction

National Australia Bank Limited (herein referred to as the National, the Company or the Group) is an international financial services group providing a comprehensive and integrated range of financial products and services across four continents and 15 countries. Globally, as at September 30, 2000, the National had:

- Total balance sheet assets of $344 billion
- Over $60 billion in assets under management and administration
- $285 billion in assets under custody and administration
- More than 12 million customers

The National is the largest financial services institution listed on the Australian Stock Exchange and was the 22nd largest financial services company in the world by profitability and 34th by revenues, (Fortune 500, July 2000).

From an operation based almost entirely in Australia in 1986, the National now has 46.0% of its assets outside Australia, which generated 48.5% of the Group's operating revenue and 47.3% of the Group's operating profit after tax and before abnormal items for the year ended September 30, 2000.

As well as diversifying its banking activities geographically, the National has also developed the financial services activities of each bank within its respective regional market to improve the quality of its earnings.

On June 30, 2000 the National completed the acquisition of MLC, a leading Australian funds management and insurance group, for $4.6 billion in cash. The National is now the largest manager of retail funds in Australia and has substantial insurance activities.

This diversification in income streams has led to an increase in the National's other operating income and reduced the reliance on net interest income. As a result, 50.6% of the National's operating income for the year ended September 30, 2000, was derived from non-interest sources.

Vision and Strategy

General

The National's vision is to build a leading international financial services group. The National is committed to growing its current profitable lines of business and focusing on areas that are key to the future growth and evolution of financial services in selected markets.

With the assistance of a global business operating model, this vision is being pursued through the following core strategies:

- Drive performance and growth in businesses that rely on relationship management and tailoring of financial services such as the small and medium business segments of the business market and the premium segment of the consumer market. The National has strategic capabilities and positions in these segments. The focus will be on developing and transforming core skills and products between the key markets in which the National operates;
- Accelerate the growth of selected global businesses where capability, efficiency and service give the Group a competitive edge such as HomeSide, Wholesale Financial Services, Wealth Management and Securities Services;
- Stake out positions in areas key to the evolution of financial services using Office to create and accelerate new economy business opportunities;
- Manage the Group businesses to create maximum value through the implementation of EVA shareholder value principles throughout all areas of the Group; and
- Build diversified income streams to reduce the Group's reliance on interest income and produce sustainable, reliable revenues.

Global Business Operating Model

In April 1998, the National introduced a business operating model to accelerate its transition to an international financial services group and to assist in achieving its vision.

On May 4, 2000 the National announced a refinement to its corporate structure. The aim of the updated business operating model is to ensure the National's structure enables it to optimise the value from its existing activities while progressively building its position in emerging and new economy businesses. Broadly, the new structure brings together existing growth businesses, high potential global businesses, and the various services required to support them.

The National uses the new lines of business for internal management reporting, and the descriptions and analysis in this Annual Financial Report are based on the new structure.

Business and Personal Financial Services

Business and Personal Financial Services (B&PFS) is the retailing arm of the Group consisting of the 38,700 staff meeting the needs of our 8.2 million customers in Australia, New Zealand, Michigan in the United States, Great Britain and both Northern Ireland and the Republic of Ireland.

B&PFS is organised around customer segments with products, services and the skills of staff matched to the needs of a customer, or a similar group of customers, in each operating region. This reflects the National's core strategy of driving performance and growth in core businesses that rely on relationship management and the tailoring of financial services.

The segment-based businesses include Business Financial Services (comprising Custom Business, Package Business and Agribusiness) and Personal Financial Services (comprising Private Banking, Premium Financial Services and Retail Financial Services). The segment-based businesses in each operating region are supported by specialist Direct Retailing and Channel Management, Marketing Services and Product and Process Management units. The aim is to develop mutually beneficial long-term relationships with customers worldwide.

A brief discussion of the National's retailing activities in each of its operating regions follows. For a detailed discussion of results by geographic segment, refer to pages 24 to 26.

Australia

In Australia, the National's retailing business units provide a full range of financial services to approximately 3.1 million customers.

The National is one of the largest providers of credit and deposit facilities in the Australian marketplace. The National's 7,200 front-line banking professionals provide savings and cheque accounts, term deposits, credit cards, personal loans, housing loans and lines of credit and transaction facilities to both business and personal customers. They also provide access to financial planners as well as tax and estate planning, trustee services, international banking, trade finance, wholesale, leasing, and payments specialists able to offer products and services tailored to customers' full financial service needs.

Overview

The Financial Review on pages 9 to 45 is prepared in accordance with Generally Accepted Accounting Principles applicable in Australia (Australian GAAP).

	Consolidated					
For years ended September 30	*2000* [1]	*1999* [2]	*1999*	*1998* [3]	*1997*	*1996* [4]
Dollars in Millions unless otherwise stated	*AUD*	*USD*	*AUD*	*AUD*	*AUD*	*AUD*
Summary of Consolidated Statements of Income						
Australian GAAP						
Interest income	17,517	9,485	15,066	15,427	12,936	12,088
Interest expense	11,146	6,036	9,000	9,569	7,578	6,958
Net interest income	6,371	3,449	6,066	5,858	5,358	5,130
Charge to provide for doubtful debts	588	318	581	587	332	333
Net interest income after provision for doubtful debts	5,783	3,131	5,485	5,271	5,026	4,797
Other operating income	6,523	3,532	4,563	3,953	2,909	2,631
Other operating expenses	7,229	3,915	5,907	5,501	4,619	4,366
Operating profit before abnormal items	5,077	2,748	4,141	3,723	3,316	3,062
Abnormal items	(204)	(110)	-	(749)	-	-
Operating profit	4,873	2,638	4,141	2,974	3,316	3,062
Income tax expense (benefit) attributable to						
Operating profit	1,700	920	1,321	1,211	1,095	959
Abnormal items	(68)	(37)	-	(252)	-	-
Total income tax expense	1,632	883	1,321	959	1,095	959
Operating profit after income tax	3,241	1,755	2,820	2,015	2,221	2,103
Outside equity interests in operating profit (loss) after tax	2	1	(1)	1	(2)	1
Operating profit after income tax attributable to members of the Company	3,239	1,754	2,821	2,014	2,223	2,102

[1] *Includes the amount relating to MLC from June 30, 2000, the date on which the Consolidated Entity acquired this entity.*

[2] *Translated at the Noon Buying Rate on September 30, 2000 of US$0.5415 = A$1.00. See Selected Financial Data for five years ended September 30, 2000 — Exchange Rates on Page 13.*

[3] *Includes the amount relating to HomeSide from February 19, 1998, the date on which the Consolidated Entity acquired this entity.*

[4] *Includes the amount relating to MNC from November 2, 1995, the date on which the Consolidated Entity acquired this entity.*

- Net interest income in 2000 increased 5.0% to $6,371 million after increases of 3.6% and 9.3% in 1999 and 1998 respectively.
- Charge to provide for doubtful debts increased 1.2% to $588 million from $581 million in 1999 after a decrease from $587 million in 1998.
- Other operating income in 2000 increased by 43.0% to $6,523 million after increases of 15.4% and 35.9% in 1999 and 1998 respectively.
- Other operating expenses in 2000 increased by 22.4% to $7,229 million after increases of 7.4% and 19.1% in 1999 and 1998 respectively.
- Operating profit before income tax and abnormal items in 2000 increased by 22.6% to $5,077 million after increases of 11.2% and 12.3% in 1999 and 1998 respectively.
- Operating profit after income tax and abnormal items increased 14.8% in 2000 to $3,239 million after increasing by 40.1% to $2,821 million in 1999 and decreasing by 9.4% to $2,014 million in 1998.
- The 2000 result included abnormal losses of $136 million after tax. There were no abnormal items in 1999, and in 1998 the result included abnormal losses of $497 million. Excluding the effect of abnormal items, operating profit after tax grew by 19.6% from $2,821 million in 1999 to $3,375 million in 2000 after an increase of 12.3% from $2,511 million in 1998.
- Gross loans and advances grew 17.8% during 2000 from $169.7 billion in 1999 to $200.0 billion. Excluding the effect of exchange rate movements, the increase was 14.2%.
- Total provision for doubtful debts increased during 2000 by 7.1% from $2,529 million in 1999 to $2,709 million. Gross non-accrual loans decreased during 2000 by 6.6% from $1,570 million to $1,467 million. Gross non-accrual loans as a percentage of risk weight assets is a modest 0.6%.
- The $4.6 billion acquisition of MLC during 2000 has reduced the Group's capital ratios, as investments in life assurance and funds management businesses are deducted from capital when calculating the ratios. The Tier 1 capital ratio as at September 30, 2000 was 6.6% compared with 7.8% in 1999 and 6.4% in 1998. The total risk weighted capital ratios at September 30, 2000, 1999 and 1998 were 9.3%, 10.4% and 9.2% respectively.

In Australia, economic growth remains robust, buoyed by pre-GST activity and also strong government spending. However, economic activity is expected to moderate to 3.75% in 2000/01 from 4.5% in 1999/00. The slowing will largely be driven by weaker private

Selected financial data for five years ended September 30, 2000

The Consolidated Entity's financial report is prepared in accordance with accounting principles generally accepted in Australia, which differ in certain material respects from accounting principles generally accepted in the United States (see Note 54 to the financial statements "Reconciliation with US GAAP"). The information hereunder has been derived from the audited financial report of the Consolidated Entity or where certain items are not shown in the consolidated financial report, has been prepared for the purpose of this annual report and should be read in conjunction with and qualified in their entirety by reference to the financial report and notes included elsewhere in this financial report. For details of credit quality data refer to pages 34 and 35. Comparative amounts have been reclassified to accord with changes in presentation made in 2000, except where otherwise stated.

	Five Year Average Compound Growth	*Consolidated*					
Five years ended September 30		*2000*[1]	*2000*[2]	*1999*	*1998*[3]	*1997*	*1996*[4]
Dollars in Millions unless otherwise stated		*AUD*	*USD*	*AUD*	*AUD*	*AUD*	*AUD*
Share Information							
Dividends paid/payable[5][6][7]	9.85%	1,858	1,066	1,655	1,467	1,367	1,276
Earnings per share (before abnormal items) ($)[7]							
- basic	9.87%	2.11	1.14	1.87	1.75	1.52	1.45
- diluted	9.29%	2.01	1.10	1.82	1.71	1.49	1.43
Earnings per share (after abnormal items) ($)[7]							
- basic	8.68%	2.02	1.10	1.87	1.40	1.52	1.45
- diluted	8.15%	1.96	1.06	1.82	1.38	1.49	1.43
Cash earnings per share (before abnormals) ($)[8]							
- basic	9.27%	2.24	1.21	2.01	1.87	1.91	1.54
- diluted	9.22%	2.16	1.17	1.95	1.83	1.58	1.52
Dividends per share ($)[5][6]	9.04%	1.23	0.67	1.12	1.02	0.94	0.87
Dividends per ADS ($)[5][6]	9.04%	6.15	3.33	5.60	5.10	4.70	4.35
Dividends per ADS (US$)[5][6][9]		N/A	N/A	N/A	3.17	3.24	3.40
Dividend cover (times) before abnormal items		1.82	1.82	1.70	1.71	1.63	1.65
Dividend cover (times) after abnormal items		1.74	1.74	1.70	1.37	1.63	1.65
Net tangible asset backing per ordinary share ($)[10][11]	1.64%	7.44	4.03	8.67	8.24	7.40	6.97
Share prices for the year ($)							
- High[12]		27.90	15.11	30.28	23.50	22.85	13.30
- Low[12]		19.88	10.77	18.99	16.87	13.15	10.98
- End[12]		25.51	13.81	22.43	20.39	21.22	13.30
Adjusted in Accord with US GAAP							
Net income	9.19%	3,051	1,652	2,862	2,093	2,289	2,147
Earnings per share[9]							
- basic	6.44%	1.90	1.03	1.89	1.46	1.56	1.48
- diluted	5.95%	1.84	1.00	1.84	1.44	1.53	1.46
Cash earnings per share[8]							
- basic	6.63%	2.03	1.10	2.03	1.59	1.66	1.57
- diluted	6.04%	1.96	1.06	1.99	1.56	1.62	1.55
Earnings per ADS[13]							
- basic	8.22%	10.15	5.50	9.45	7.30	7.80	7.40
- diluted	7.64%	9.80	5.31	9.20	7.20	7.65	7.30

Other operating income

Other Operating Income

2000	$ 6,321 million
1999	$ 4,967 million
1998	$ 3,251 million

Other operating income includes loan fees from banking, money transfer fees, net mortgage servicing fees, trading income, foreign exchange income, income from wealth management activities, fees and commissions and other income including rental income, dividends received and profit on sale of fixed assets.

Other operating income increased by $1,960 million or 43.0% in 2000 after an increase of 15.4% in 1999. Exchange rate movements during 2000 increased other operating income by $32 million. The adoption of AASB 1038 'Life Insurance Business' led to an increase in other income of $649 million due to the gross up of income, and $202 million due to revaluations. The 2000 year reflects a three months contribution from MLC businesses, including $699 million in other operating income. Income from net mortgage servicing fees increased by 71.5% during the year however net mortgage origination revenue fell by 53.1%. Mortgage origination revenue decreased as a result of diminished refinance activity, causing a decrease in production volume. In addition, increased competition and extreme rate volatility in the market caused a decrease in margins. Loan fees from banking grew 15.7% due to increased banking activity and higher volumes which also resulted in increased fee and commission income of 15.0%.

As a result of this growth, excluding the impact of AASB 1038, 47.1% of net income was derived from non-interest sources for the 2000 year (1999: 42.9%). The change in income mix demonstrates the success the Group has been able to achieve to date in its strategy of diversifying the income base to provide greater stability in income streams.

Loan Fees from Banking

2000	$ 1,249 million
1999	$ 1,077 million
1998	$ 938 million

Loan fees from banking primarily consist of acceptance fees, which are charged for accepting bills of exchange, application fees charged to cover costs of establishing lending facilities, commitment fees charged to compensate for undrawn funds set aside for a customer's ultimate use and service fees to cover costs of maintaining credit facilities.

Loan fees from banking in 2000 increased by $169 million or 15.7% after increasing 14.8% in 1999. The increase in 2000 reflects increased activity across all geographic regions.

Money Transfer Fees

2000	$ 1,048 million
1999	$ 1,030 million
1998	$ 1,050 million

Money transfer fees are fees earned on the transfer of monies between accounts and/or countries and include fees for bank cheques and electronic transfers, dishonours and special clearances and periodical payments.

Money transfer fees in 2000 increased by $18 million or 1.7% after decreasing 1.9% in 1999. The slow growth rate reflects the migration of customers to lower cost electronic distribution channels.

Revenue from Life Insurance Business

2000	$ 1,557 million

Interest, dividends realised and unrealised capital gains and other returns on all the investments under the life insurer's control are revenues of the life insurer.

Revaluation of Life Insurance Entities Interests in their Controlled Entities

2000	$ 202 million

Following the adoption of AASB 1038, life insurance entities of the Consolidated Entity are required to value their investments in subsidiaries at market value, with changes in the excess of market value over recognised net assets reflected in the consolidated profit and loss statement.

At September 30, 2000, valuations of National Australia Financial Management Limited's (NAFM's) subsidiaries, based on those carried out by independent actuaries Tillinghast-Towers Perrin and Trowbridge Consulting, gave rise to a $202 million upward revaluation.

Tillinghast-Towers Perrin valued the MLC Group, whose key entities include MLC Limited and MLC Lifetime Company Limited. Trowbridge Consulting valued the non-MLC Group subsidiaries of NAFM, whose key entities include National Asset Management Limited, National Australia Fund Management Limited and County Investment Management Limited.

Other operating income (continued)

In respect of the valuation of the MLC Group, the value is net of estimated integration costs associated with the acquisition of the MLC Group by NAFM and includes the value of estimated future revenue and expense synergies, as identified by management. Tillinghast-Towers Perrin has reviewed these estimated synergies and integration costs for reasonableness and has concluded that, while there is clearly considerable uncertainty surrounding these estimates, they are not unreasonable for the purpose of that valuation.

The following table summarises the valuation of subsidiaries.

Consolidated *As at September 30, 2000* *Dollars in Millions*	
MLC Group	
Life companies embedded value [1]	1,887
Life companies value of future new business before synergies [2]	1,113
Other companies before synergies	756
Other NAFM subsidiaries before synergies	332
Value of revenue and expense synergies arising in subsidiaries from the integration of MLC Group with the National Group after allowance for costs of implementation of relevant plans [3]	1,274
Market value	5,362
Recognised net assets	780
Excess of market value over recognised net assets as at September 30, 2000	4,582

The following table reconciles the movement in the excess of net market value over recognised net assets.

Excess of market value over recognised net assets as at October 1, 1999	203
Excess included in acquisition of MLC Group	4,177
Total excess before current period movement	4,380
Movement recognised in consolidated profit and loss statement	
MLC Group - life companies	47
MLC Group - other companies	76
Other NAFM subsidiaries	79
Total movement recognised in the consolidated profit and loss statement	202
Excess of market value over recognised net assets as at September 30, 2000	4,582

[1] Embedded value is the sum of
- the shareholders' interest in the net market value of the entity's assets in excess of regulatory capital requirements and other liabilities, and
- the present value of estimated future shareholder distributable profits and imputation credits associated with the existing portfolio of business of the entity.
The amount shown excludes the value of the life companies' own subsidiaries, which is shown in the above table separately.
[2] Value of future new business is the present value of estimated future shareholder distributable profits and imputation credits associated with the expected future sales of the entity.
[3] Synergy benefits include the value of some future new business previously assumed to arise in National Australia Financial Management Limited.

Significant assumptions used in the valuation basis adopted by the independent actuaries include:
(a) The valuations are based on the present value of estimated after tax distributable profits, together with the present value of 70% of attributable imputation credits in the case of the Australian entities.
(b) Present values have been determined at the following risk discount rates:

Life insurance business within Australia	*12%*
Funds management business within Australia	*15%*
Life insurance business written in US dollars within Indonesia	*17.5%*
Life insurance business written in Indonesian Rupiah within Indonesia	*20.5%*
Life insurance business written in US dollars within Hong Kong	*11%*
Life insurance business written in Hong Kong dollars within Hong Kong	*14%*

(c) In the case of the life insurance entities, the value of future business above has been determined by applying a multiplier to the value of one year's sales. The average multipliers used were as follows:

MLC Limited	*9*
MLC Life Insurance Company Limited	*10*
CFF Lend Lease Life Assurance Limited	*9*
PT Simas Lend Lease Life	*7*

Net Mortgage Servicing Fees

2000	*$ 535 million*
1999	*$ 312 million*
1998	*$ 197 million*

Following the acquisition of HomeSide in February 1998, the Group derives fees from mortgage servicing. Net mortgage servicing fee income represents fee income derived from mortgage servicing activities less amortisation of capitalised cost. Refer to Note 1 to the financial statements for more details.

Net mortgage servicing fees in 2000 increased by $223 million or 71.5% over 1999, reflecting an increase in the servicing portfolio due to higher volumes from strategic alliances entered into during 1999.

Other operating income (continued)

Net Mortgage Origination Revenue

2000	$ 105 million
1999	$ 224 million
1998	$ 126 million

Following the acquisition of HomeSide in February 1998, the Group derives fee income from mortgage origination and selling activities. Net mortgage origination revenue is comprised of fees earned on the origination of mortgage loans, gains and losses on the sale of loans, gains and losses resulting from hedges of secondary marketing activity and fees charged to review loan documents for purchased loan production.

Net mortgage origination revenue in 2000 decreased by $119 million or 53.1% over 1999, reflecting a decrease in production volume and a decrease in production pricing fee margins. The increasing interest rate environment has adversely impacted the mortgage origination market and sparked fierce price competition.

Fees and Commissions - banking

2000	$ 1,098 million
1999	$ 955 million
1998	$ 829 million

Fees and commissions consist of fees charged to cover the costs of establishing credit card facilities and commissions.

Fees and commissions income increased by $145 million or 15.0% in 2000 after increasing 15.2% in 1999. The increase in fee and commission income is due primarily to higher personal insurance income and credit card fees related to growth in volumes.

Treasury Related Income

2000	$ 468 million
1999	$ 457 million
1998	$ 360 million

Treasury related income includes all realised and unrealised profits and losses resulting directly from foreign exchange trading activities, trading securities and interest rate related derivative trading activities. Treasury related income increased by $11 million or 2.4% in 2000 after increasing by 26.9% in 1999.

Other Income

2000	$ 264 million
1999	$ 504 million
1998	$ 453 million

Other income includes other wealth management income, rental income, dividends received, profit on sale of fixed assets, foreign exchange income and sundry other income.

Other income decreased by $156 million or 30.7% in 2000 after increasing by 12.1% in 1999. The decrease in Other Income reflects the separate disclosure of income from life insurance operations previously disclosed net of expenses and tax.

Other Operating Expenses (Excluding Goodwill Amortisation and Abnormal Items)

2000	$ 7,032 million
1999	$ 5,701 million
1998	$ 5,320 million

In 2000 other operating expenses, including personnel, occupancy and other general expenses (but excluding goodwill amortisation and abnormal items) increased $1,331 million or 23.4% over 1999. Excluding the impact of three months of MLC expenses ($607 million), and the gross up of expenses as a result of AASB 1038 ($573 million), other operating expenses increased by 2.6% or $151 million. This compares with an increase of 7.2% in 1999. Adjusting for the effects of movements in exchange rates, the increase of 2.9% becomes an increase of 2.5%.

The movement in expenses resulted from:

Personnel Costs

2000	$ 3,401 million
1999	$ 3,267 million
1998	$ 3,036 million

Other operating expenses (continued)

Occupancy Costs

2000	$	512 million
1999	$	496 million
1998	$	480 million

General Expenses

2000	$	2,119 million
1999	$	1,936 million
1998	$	1,804 million

Excluding the impact of MLC, personnel costs increased by 2.2% or $72 million, which reflects market based salary increases, increased contractor costs (telephonic channel in Australia and growth in Securities Services in Australia) and higher performance based compensation. Partially offsetting these increases are lower long service leave charges.

Excluding the impact of MLC, occupancy costs for 2000 increased by $8 million or 1.6%, which reflects higher rental expense partly offset by lower land tax and rates, both resulting from the sale and leaseback activities in Australia and Europe. Rental expense also increased due to the opening of several new financial centres for Michigan National.

Excluding the impact of MLC and AASB 1038, general expenses increased by $60 million or 3.4% which was mainly attributable to higher data processing equipment depreciation, reflecting an increase in IT capital purchases, increased consultants and other professional fees, higher advertising and marketing, and increased legal expenses. Partly offsetting these increases were lower non lending losses and the write down during 1999 in the residual value of leased vehicles.

The Group's cost to income ratio (excluding the impact of MLC and AASB 1038) was 51.2% in 2000 compared to 53.6% in 1999. The Group's cost to income ratio has improved, due to continued income growth and effective cost control.

Refer to Note 4 to the financial report for details of income and expense items.

Abnormal Items

Abnormal items recognised in 2000 related to restructuring costs of $98 million, partly offset by the write-back of $2 million to the abnormal restructuring provision raised in 1998, and business integration costs of $108 million.

Restructuring Costs

During 2000, the Group recognised restructuring costs of $98 million resulting from two major initiatives. The majority of these costs are expected to be recovered by the end of 2003 from annual productivity improvements and revenue enhancements. The first initiative involves a significant transformation of Business & Personal Financial Services' Australian distribution network to meet the rapidly customer changing preferences for accessing financial services. The second initiative is intended to bring about globally consistent processes and the centralisation of processes where scale efficiencies can be realised for Wholesale Financial Services.

The total restructuring charge included $23 million for redundancy and outplacement, $40 million for occupancy costs including surplus leased space resulting from branch closures, relocations and reconfigurations, $29 million for asset writedowns associated with restructuring business operations and $6 million for other restructuring initiatives. The restructuring charge was classified as an abnormal item due to its size and effect on the Group's result.

The $23 million in redundancy and outplacement costs related to redundancies for approximately 192 positions in support and Head Office roles. In the period ended September 30, 2000, payments of $3 million were made in respect of 36 positions made redundant.

During 1998, the Group recognised restructuring costs of $280 million resulting from its transition to a fully integrated financial services organisation, including migration to a new operating framework and distribution, technology and workforce initiatives to improve operational efficiency and productivity.

During 2000, the Group recognised a write-back to the provision for restructuring costs raised in 1998 of $2 million. This write-back was based on periodic evaluations to ensure that any accrued amount no longer needed for its originally intended purpose is reversed in a timely manner.

At September 30, 2000 the total provision for restructuring was $166 million. The provision for restructuring (refer to Note 29 to the financial statements) represents the liability relating to future payments for redundancies, occupancy and general costs. Future payments for redundancies and general costs will predominantly be made in 2001. Future payments for occupancy costs will be made as periods corresponding with the relevant lease terms. Future expenditure relating to the liability is not expected to have a significant effect on the liquidity or financial position of the Group.

Other restructuring costs incurred in 2000 and 1999 have been expensed as incurred. Such costs were not material. Refer to Notes 4 and 5 to the financial statements for further details regarding restructuring costs.

Business Integration Costs

During 2000, the Group recognised business integration costs of $108 million resulting from the integration of MLC's operations with the Group's existing life insurance and funds management businesses. The total integration charge included costs for the integration of asset management and administration systems, changes to information technology and distribution systems, the on-going functional requirements of the MLC Group as a result of the separation from Lend Lease Corporation Limited, the previous owner of MLC, and the write-off of capitalised software and systems which will not form part of the integrated Wealth Management business going forward.

Operating Profit After Income Tax

Profitability

Operating Profit after income tax and outside equity interest (before abnormal items) increased by 19.6% to $3,375 million in 2000 from $2,821 million in 1999 and by 12.3% in 1999 from $2,511 million in 1998. The profit after tax before abnormal items for 2000 included $17 million from exchange rate movements compared with $9 million in 1999. Operating profit after income tax and abnormal items was $3,239 million in 2000 and $2,014 million in 1998. There were no abnormal items in the 1999 year.

This increase in earnings after tax before abnormal items primarily reflected:

- a $105 million contribution from MLC before funding costs for the 3 months to September 2000;
- a $305 million or 9.0% increase in net interest income in 2000 after a $208 million or 3.6% increase in 1999 (4.7% excluding exchange rate movements);
- a $1,960 million or 43.2% increase in other operating income in 2000 after a $610 million or 15.4% increase in 1999. Excluding the impact of life insurance standard AASB 1038 and other operating income of MLC, other operating income increased by 8.8% in 2000; and
- a $1,321 million or 23.4% increase in operating expenses (before goodwill amortisation) after a $407 million or 7.6% increase in 1999. Excluding the impact of AASB 1038, the expenses of MLC and exchange rate movements, operating expenses increased by 2.3% in 2000.

The result reflects the Group's continued efforts to diversify its income streams across geographies and business lines. The acquisition of MLC on June 30, 2000 has particularly assisted in this regard. As a result, for the September 30, 2000 year, 50.6% of net income was derived from non interest sources while 47.3% of the Group's operating profit after tax was generated outside Australia.

Despite market based increases in personnel costs and higher depreciation charges, e-commerce and marketing expenses, the Group's cost to income ratio, excluding the impact of MLC and AASB 1038, reduced to 51.2% from 53.6% in 1999.

For years ended September 30 *Dollars in millions*	*2000*	*1999*	*1998*	*1997*	*1996*	*Average Growth Compound %*
Operating profit						
(after tax and outside equity interest and before abnormal items)	3,375	2,821	2,511	2,223	2,102	12.57%
Abnormal items	(204)	-	(749)	-	-	
Income tax expense	1,632	1,321	959	1,095	959	14.22%
Operating profit (before tax after outside equity interest)	4,803	4,142	2,721	3,318	3,061	11.92%

Adjusted to Accord with US GAAP

Prepared in accordance with US GAAP, consolidated net income for the year to September 30, 2000 was $3,051 million compared to $2,862 million in 1999 and $2,099 million in 1998. There were no individually material adjustments between US GAAP net income and Australian GAAP net profit for the years ended September 30, 2000, 1999 and 1998. See Note 54 to the financial statements for a detailed reconciliation of Australian GAAP net profit to US GAAP net income.

Underlying Profit

Underlying profit shows the growth in the core business of the organisation, and provides an indication of its capacity to absorb current and possible future bad debts charges.

Operating profit after income tax (continued)

For years ended September 30	*2000*	*1999*	*1998*	*1997*	*1996*
Dollars in Millions					
Operating profit before tax, doubtful debt expense, goodwill amortisation and abnormal items	5,862	4,928	4,491	3,790	3,532
Goodwill amortisation	(197)	(206)	(181)	(142)	(137)
Underlying profit	5,665	4,722	4,310	3,648	3,395
Deduct					
Charge to provide for doubtful debts	(588)	(581)	(587)	(332)	(333)
Income tax expense	(1,700)	(1,321)	(1,211)	(1,295)	(959)
Operating profit before abnormal items and outside equity interests	3,377	2,820	2,512	2,221	2,103
Add/(Deduct) Abnormal items (after tax)	(136)	-	(497)	-	-
Operating profit after income tax before outside equity interest (per Statement of Profit and Loss)	3,241	2,820	2,015	2,221	2,103
Outside equity interests in operating profit after income tax	2	(1)	1	(2)	1
Operating profit after income tax attributable to members of the Company	3,239	2,821	2,014	2,223	2,102

Operating Profit By Segments

Contributions to Consolidated Operating Profit by Major Operating Segments:

In April 1998, the Group introduced a new business operating model, designed to leverage its global scale while improving its customer focus. This model was refined during 2000. On May 4, 2000 the National announced further changes to its corporate structure. Broadly, the new structure brings together existing growth businesses, high potential global businesses and the various services required to support them. The previous Products and Services division was restructured and four new divisions were created, Wealth Management, Specialist and Emerging Business, National Shared Services and O_2e. The financial results of O_2e are currently not disclosed separately but are included within the results below.

For year ended September 30	*2000*
Dollars in Millions	
Operating Segments:	
Business and Personal Financial Services	2,259
Wealth Management	222
Wholesale Financial Services	586
Specialist and Emerging Businesses	310
HomeSide	132
National Shared Services	(141)
All Other	(129)
Operating Profit after Tax and Outside Equity Interests	3,239

Comparatives for the current basis of segmentation for 1999 and 1998 are not provided as it is impracticable to do so. Refer to Note 3 to the financial statements for further details on the Group's major operating segments.

During 2000, the Group's operating profit after income tax increased 14.8% to $3,239 million after increasing by 40.1% to $2,821 million in 1999 and decreasing by 9.4% to $2,016 million in 1998. The 1998 result included abnormal charges of $497 million after tax. There were no abnormal items in 1999, and a $136 million abnormal charge in 2000. Excluding the effect of abnormal items, operating profit after tax grew by 19.6% in 2000 from $2,821 million in 1999 to $3,375 million, and by 12.3% in 1999. Excluding the impact of the acquisition of MLC and the adoption of AASB 1038, operating profit after tax and before abnormals increased by 14.5% in 2000 to $3,229 million.

The 2000 result reflects strong growth in lending and the benefits of the Group's income diversification deriving from a broad geographic and business spread, operating efficiency and risk management. The Group's international operations contributed $1,593 million or 49.2% of the profit after tax for 2000. This compares with 1996 when the Group derived only 31.1% of the profit after tax from operations outside Australia.

Operating profit by segments (continued)

Contribution to Consolidated Operating Profit by Major Geographic Areas:

For the year ended September 30	*2000*	*1999*	*1998*	*1997*	*1996*
Dollars in Millions					
Australian Group:					
Australia	1,778	1,405	1,351	1,325	1,448
Less Goodwill amortisation	(1)	(11)	(6)	-	-
Abnormal items (after tax)	(131)	-	(253)	-	-
Total Australian Group	1,646	1,394	1,092	1,325	1,448
European Group:					
Clydesdale Bank	333	262	286	211	162
Northern Bank	163	171	169	119	97
Yorkshire Bank	375	343	344	227	159
National Irish Bank	11	31	33	33	27
National Australia Life	2	10	5	5	(9)
Other [1]	(17)	6	(62)	(45)	(33)
Less Goodwill amortisation	(63)	(62)	(62)	(62)	(62)
Abnormal items (after tax)	(1)	-	(236)	-	-
Total European Group	804	761	477	488	341
New Zealand Group:					
Bank of New Zealand	315	298	280	277	241
NAG(NZ)	(30)	(27)	(42)	(49)	(49)
Less Goodwill amortisation	(31)	(31)	(31)	(31)	(31)
Abnormal items (after tax)	-	-	(18)	-	-
Total New Zealand Group	254	240	189	197	161
United States Group:					
Michigan National Corporation	291	254	226	232	158
HomeSide	141	153	84	-	-
Other [2]	161	98	(7)	8	17
Less Goodwill amortisation	(103)	(102)	(92)	(49)	(44)
Abnormal items (after tax)	-	-	13	-	-
Total United States Group	490	383	234	191	131
Asian Group					
Asian Branches	39	23	13	18	13
Other [3]	10	20	12	10	8
Less Abnormal items (after tax)	(4)	-	(3)	-	-
Total Asian Group	45	43	22	28	21
Operating Profit after Tax and Outside Equity Interests	3,239	2,821	2,014	2,229	2,102

[1] *Europe Other includes National Australia Group (Europe) Limited, London Branch, NAB Investments Limited and NAB Finance (Ireland) Limited.*
[2] *US Other includes New York Branch, National Australia Funding (Delaware) Inc., National American Investments, Inc. and HomeSide Investments, Inc.*
[3] *Asia Other includes Asiasia Insurance Pte Limited.*

Operating Profit by Major Geographic Areas

Australian Group

The Australian Group includes Personal Banking, Business Banking, Wholesale Banking, National Australia Financial Management, MLC Group, National Asset Management, the Australian Property Companies, Custom Service Leasing, National Australia Trustees, Global Securities Services and County Investment Management and National Australia Investment Capital, corporate centre costs and National Equities.

Australia produced a strong result with operating profit after tax (before goodwill amortisation and abnormal items) increasing by $373 million or 26.5% to $1,778 million in 2000 from $1,405 million in 1999 and $1,351 million in 1998. The cost income ratio increased during the period from 53.5% to 56.0%, primarily due to the inclusion of MLC for the fourth quarter. Adjusting for the impact of the MLC acquisition, the opportunity cost of capital used to fund the acquisition and debt funding costs, and the grossing up of income and expenses as a result of the adoption of AASB 1038 "Life Insurance Business", the cost to income ratio declined from 53.5% to 49.7%.

The inclusion of MLC's results for the three months to September 30, 2000 contributed $105 million before funding costs, including $53 million from revaluation of the investment in MLC and its subsidiary and $54 million from margin on services provided.

Net interest income increased by $243 million or 8.5% in 2000 due to strong lending growth and effective margin management.

The introduction of AASB 1038 impacted revenue, expense and tax disclosure in the 2000 year. The standard requires revenue, expenses and tax to be separately disclosed, these amounts were reported on a net basis in other operating income in previous periods. As a result of the new accounting standard, revenue and expenses and tax before MLC increased by $586 million, $510 million and $76 million respectively for the September 2000 year. The net adjustment had no impact on profit.

After adjusting for AASB 1038, the revaluation of the investments in life insurance entities and the inclusion of MLC's results for three months, other operating income showed strong growth increasing by 7.6% due to volume related growth in credit card fee income, higher fee income from strong growth in lending.

Excluding the impact of AASB 1038 and MLC, other operating expenses grew 2.1% during 2000. Contributing to the increase were market related increases in personnel costs, higher communication costs reflecting channel management strategy and fees and commissions which reflected higher card and electronic transaction volumes.

The charge for doubtful debts increased 15% from $180 million in 1999 to $207 million in 2000 due to volume related growth and a change in asset mix partly offset by lower specific provisioning. Strong credit quality was maintained with gross non accrual loans as a percentage of total loans and advances reducing from 0.75% in 1999 to 0.61%.

Tax expense for the September 2000 year was impacted by $47 million due to the revaluation of new future income tax benefits to reflect the lower Australian tax rates that will apply for future years and $76 million due to the gross up from the adoption of AASB 1038.

European Group

The European banks are now being managed as two regions. The Great Britain region includes Clydesdale and Yorkshire Banks and the Irish region comprises Northern and National Irish Banks.

Common management and processes are being progressively adopted in each region and the individual regional results need to be viewed in total to understand underlying regional performance. A process has been commenced to consolidate the legal entity structures of the two Great Britain banks and the two Irish banks to reflect the new management structure.

Great Britain

Great Britain's profit after tax (before goodwill amortisation and abnormal items) grew 11.6% in the year to $693 million. The result was due to strong lending growth and volume related growth in other operating income.

Clydesdale Bank's profit after tax (before goodwill amortisation and abnormal items) increased by 27.1% to $333 million in 2000 from $262 million in 1999 and $286 million in 1998. The improvement in the Clydesdale result was attributable to higher net interest income, reflecting increased lending volumes and a small improvement in margin, volume related increases in lending fees and brokerage/commission, and a lower doubtful debts charge. Expenses increased 6.9% (5.3% in local currency) due to sale and leaseback activities and from a change in the methodology used for the recognition of credit card non lending losses.

Yorkshire Bank's profit after tax (before goodwill amortisation and abnormal items) was $375 million, an increase of 9.3% compared with 1999 of $343 million and $344 million in 1998. Underlying profit of $676 million grew by 12.5%. Contributing to Yorkshire's result were higher net interest income due to lending volume increases partly offset by the impact of competitive pressures and product mix on customer lending margins. Volume related increases in lending fees and brokerage/commissions, drove a 4.2% increase in non interest income while lower operating expenses were due to a write down in the residual value of leased vehicles in the prior year.

Ireland

The combined result for the two banks in Ireland represented a reduction in profit of 13.9% mainly impacted by a reduction in net interest margin and higher expenses, including the investigation costs in National Irish Bank and provision for the Deposit Interest Retention Tax settlement of $11 million.

Northern Bank's profit after tax (before goodwill amortisation and abnormal items) decreased by $8 million or 4.7% (4.5% in local currency terms) to $163 million from $171 million in 1999 and $169 million in 1998. This outcome was principally due to a 9.1% (8.3% in local currency) increase in operating expenses. This was driven by an increase in charges for support activities from the NAG Europe operation with a greater proportion of the European Group's costs now being consolidated directly into the results of Northern Bank. Occupancy costs also showed an increase reflecting the impact of the prior year's sale and leaseback of properties, with the sale proceeds being recorded in the previous year's results.

Bad and doubtful debts charge increased by $3 million due to one large provision in the September quarter. Net interest income was in line with the previous year. While in local currency terms gross loans and advances increased by 21.4%, this was offset by a contraction in net interest margin by 12 basis points to 3.94%. Other operating income grew by 7.2% (6.2% in local currency) resulting from improved life insurance commission income, an increase in treasury income driven by new products and increases in application and service fees.

National Irish Bank's profit after tax (before goodwill amortisation and abnormal items) reduced from $31 million in 1999 to $11 million for the current year and $33 million in 1998. Net interest income declined by 8.5% (no change in local currency terms) reflecting the entry of new competitors in the Irish market place which has had a significant impact on mortgage margins, offset by growth in fixed rate and term lending.

Expenses increased by 7.1% mainly reflecting on-going investigation costs, while other operating income was lower by 9.6% (4.2% in local currency) principally due to profits on disposal of properties in the prior year.

New Zealand Group

The New Zealand Group contributed a profit after tax (before goodwill amortisation and abnormal items) of $285 million compared to $271 million in 1999, an increase of 5.2%, and $238 million in 1998.

Bank of New Zealand (BNZ), including its offshore operations, contributed a profit after tax (before goodwill amortisation and abnormal items) of $315 million in 2000 compared to $302 million in 1999, an increase of 5.7%, (8.1% in local currency), and $280 million in 1998.

Net interest income increased by 2.0% (7.7% in local currency terms) during the 2000 year to $509 million from $498 million in 1999 due to an improved net interest margin and growth in lending.

Other operating income rose by $57 million or 16.9% to $395 million from $339 million in 1999 and $300 million in 1998, due to growth in treasury related trading income, origination fees from project and structured finance transactions, and higher insurance and credit card fee income. Higher credit card fee income reflects the introduction of new products and loyalty programs.

Other operating expenses increased 3.6% from $476 million in 1999 to $493 million in 2000 and $506 million in 1998 reflecting higher volume related operating expenses and a non lending loss recovery recorded in the previous year.

United States Group

The United States Group contributed a profit after tax (before goodwill amortisation and abnormal items) of $592 million compared to $485 million in 1999, an increase of 60.1%, and $104 million in 1998. Excluding the impact of exchange rate movements, profit for the United States Group increased by 17.1%.

MNC contributed a profit after tax (before goodwill amortisation and abnormal items) of $291 million in 2000, an increase of 14.6% (9.2% in local currency) from $254 million in 1999 and $226 million in 1998. Contributing to the increase in profit was an increase in other operating income of 10.9% (5.1% in local currency terms). In local currency terms, net interest income decreased by 1.3% due to tightening lending margins, which were partly offset by higher volumes. Other operating expenses have decreased 2.6% in local currency terms due to lower contractor costs and lower bureau charges. MNC's cost to income ratio improved from 51.2% in 1999 to 51.5% in 2000 due to income growth and cost containment.

HomeSide US, contributed a profit after tax (before goodwill amortisation and abnormal items) of $141 million compared to $153 million in 1999 and $84 million in 1998. Excluding the impact of exchange rate movements, HomeSide's profit decreased by 12.2%. Net servicing revenue was significantly higher than the prior year (53.0% in local currency terms) due to an 18% increase in the average servicing portfolio, lower average servicing costs and a lower amortisation rate, reflecting the impact of higher mortgage interest rates on prepayment activity. Mortgage origination revenue decreased by 55.6% in local currency terms, as a result of diminished refinance activity. In addition, pricing competition and extreme rate volatility in the market caused a decrease in margins.

HomeSide also experienced a significant decrease in net interest income largely due to lower mortgage production volumes, resulting from rising interest rates in the US, which impacted the level of mortgage loans held for resale. Excluding exchange rate effects, operating expenses decreased by 12.2% as a result of cost containment initiatives in respect to lower production volumes and a decrease in the servicing cost per loan.

NAB New York also contributed to the United States profit with an increase in profit after tax (before goodwill amortisation and abnormal items) of 113.6% from $66 million to $141 million. The increase in profit was due to a large increase in net interest income of 156.7% attributable to National Income Securities Funding which was raised in August 1999.

Asian Group

The contribution from Asian operations increased from $43 million (before abnormals) for 1999 and $25 million in 1998, to $49 million in 2000. The Asian region continues to experience improved confidence which was reflected in the improvement in the quality of the business written and lower provision for doubtful debts which contributed to the strong profit growth.

Long-Lived Assets ED 206-B requires that an entity recognise a liability for an asset retirement obligation when that obligation meets the definition of a liability, the future transfer of assets is probable, and the amount of the liability can be reliably estimated. The exposure draft also requires an entity to initially measure the liability for an asset retirement obligation at fair value. The Standard emanating from ED 206-B is likely to apply to the Group's financial report for the year ending September 30, 2003 and is not expected to have a significant impact.

Corporate Governance

The main Corporate Governance practices that were in place throughout the financial year are outlined below.

The Board of Directors is responsible for the Corporate Governance of National Australia Bank Limited and its controlled entities. The Directors of the Company have a duty to act honestly, transparently, diligently, independently and in the best interests of all shareholders, in order to increase shareholder value. The major processes by which the Directors meet these duties are described in this Corporate Governance Statement.

Responsibilities and Functions of the Board

The most significant responsibilities of the Board are:

- reporting to shareholders and the market;
- ensuring regulatory compliance;
- ensuring compliance with prudential regulations and standards;
- ensuring the maintenance of credit quality;
- ensuring adequate risk management processes;
- reviewing internal controls and internal and external audit reports;
- monitoring and influencing the culture, reputation and ethical standards of the Company and Consolidated Entity;
- monitoring the Board composition, director selection and Board processes and performance;
- approving key executive appointments and ensuring executive succession planning;
- reviewing the performance of the Managing Director and Chief Executive Officer and senior management;
- reviewing and approving executive remuneration;
- ensuring that the Board has an in-depth understanding of each substantial segment of the business;
- validating and approving corporate strategy;
- reviewing the assumptions and rationale underlying the annual plans and approving such plans;
- reviewing business results, monitoring budgetary control and corrective actions (if required); and
- authorising and monitoring major investment and strategic commitments.

There is a Principal Board Audit Committee, a Compensation & Nomination Committee and Board Committees are set up to consider large credit facilities and large borrowing programs. Other Board committees are established from time to time to consider matters of special importance including capital strategies, major investments and commitments, capital expenditure, delegation of authorities to act and the allocation of resources.

Board Appraisal

The Board has a process to review and evaluate the performance of the Board. The process involves all of the Board's key areas of responsibility listed above.

Composition of the Board

At present, the composition of the Board of Directors of the Company is one executive director and seven independent non-executive directors including the Chairman. Details in respect of individual directors are contained on pages 48 and 49 of this Annual Financial Report 2000.

The composition of the Board is set having regard to the following factors:

- The Constitution of the Company provides for the number of directors to be not less than five nor more than fourteen as the directors determine from time to time;
- The Chairman of the Board should be an independent non-executive director;
- The Board should comprise a majority of independent, non-executive directors; and
- The Board should comprise directors with a broad range of expertise and knowledge. Current or previous experience as the chief executive of a significant enterprise with international operations is highly regarded.

In accordance with the Constitution at least one third of the directors retire from office at the annual general meeting each year. Such retiring directors may be eligible for re-election. When a vacancy exists, the full Board identifies candidates with the appropriate expertise and experience utilising external consultants as appropriate. The most suitable candidate is appointed but must stand for election at the next annual general meeting.

The retirement age for non-executive directors has been fixed by the shareholders at 70 years of age.

Directors' Arrangement with the Company

The Constitution provides that a director may enter into an arrangement with the Company or with any controlled entity. Directors or their firms may act in a professional capacity for the Company or controlled entities, other than to act as an Auditor of the Company. These arrangements are subject to the restrictions of the Corporations Law. Financial services must be provided to directors under terms and conditions that would normally apply to the public, or in the case of an executive director under terms and conditions that would normally apply to employees. Disclosure of related party transactions is set out in Note 48 to the financial statements.

When a potential conflict of interest arises, the director concerned does not receive copies of the relevant Board papers and withdraws from the Board Meeting whilst such matters are considered. Accordingly, the director concerned takes no part in discussions nor exercises any influence over other members of the Board if a potential conflict of interest exists.

Board and Committee Agendas

Board and Committee agendas are structured throughout the year in order to ensure that each of the significant responsibilities of

the Board, referred to earlier, is addressed. This includes the Board receiving a detailed overview of the performance and significant issues confronting each business unit and the Corporate Centre, and to identify major risk elements for review to ensure that assets are properly valued and that protective strategies are in place.

Directors receive detailed financial, operational and strategy reports from senior management during the year and management is available to discuss the reports with the Board.

Independent Professional Advice

Each director has the right to seek independent professional advice at the Company's expense subject to the prior approval of the Chairman.

Sales / Purchase of Securities by Directors

A director or officer must not buy, sell or subscribe for securities in the Company if they are in possession of 'inside information', i.e. information that is not generally available, and, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of the securities in the Company. The Corporations Law provides that a reasonable person would be taken to expect information to have a material effect on the price or value of securities of a body corporate if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the securities.

Directors may only trade in the Company's securities (subject to the insider trading restrictions above), during each of the four weeks following each quarterly profit announcement or the date of issue of a prospectus. Directors should discuss their intention to trade in the Company's securities with the Chairman of the Company prior to trading.

In addition, directors must not trade in the shares of any other entity if inside information on such entity comes to the attention of the director by virtue of holding office as a director of the Company.

Confidential Information

The Company through its operations possesses confidential information in respect of a number of organisations and, quite apart from its legal obligations, the Company has systems and processes to ensure that this information is not released to its related entities such as the funds management and development capital business units. This ensures that such information is not exploited for the benefit of the Company.

Internal control systems are monitored and employee integrity within the organisation is fostered to ensure that confidential customer information is not disclosed outside the organisation or used for individual personal gain nor for the gain of any entity within the Consolidated Entity.

Remuneration of Directors

The remuneration policy for directors is set out in the Report of the Directors on pages 51 and 52 of this Annual Financial Report 2000 and the remuneration of each director and the formula for calculation of retirement allowances of directors is set out in Note 46 to the financial statements.

Remuneration and Succession Planning for Executives

The full Board reviews the succession planning for executive management and sets the remuneration packages applicable to the Managing Director and Chief Executive Officer and senior executives. The remuneration policy for executives is set out in the Report of the Directors on pages 51 and 52 of this Annual Financial Report 2000. Further details on the remuneration of executives, including the remuneration of the five executives receiving the highest emolument, is set out in Note 50 to the financial statements.

Communicating with Shareholders

It is the intention of the Board that shareholders are informed of all major developments that impact on the Company. Information is communicated to shareholders through:

- the annual review (unless a shareholder has requested not to receive the document);
- the Annual Financial Report (for those shareholders who have requested a copy);
- disclosures to the Stock Exchanges in Australia, London, Luxembourg, New York, New Zealand and Tokyo, the Australian Securities and Investments Commission and US Securities and Exchange Commission;
- notices and explanatory memoranda of Annual General Meetings;
- the *National Shareholders Bulletin* which provides shareholders with details of profit performance and other matters of interest; and
- the Internet on www.national.com.au.

Audit Committee

The Company has an Audit Committee whose role is documented in a Charter which has been approved by the Board. The Charter defines the purpose, authority and responsibility of the Committee. In accordance with this Charter, all members of the Committee must be independent non-executive directors.

The members of the Audit Committee at the date of the Report of the Directors are:

Mrs CM Walter (Chairman)
Mr DCK Allen
Mr MR Rayner

The internal and external auditors, the Managing Director and Chief Executive Officer, the Chief Financial Officer and other members of management are invited to attend Audit Committee meetings at the discretion of the Committee.

The responsibilities of the Audit Committee include:

- reporting to the Board on its activities, and formally noting the agendas and minutes of the intervening Audit Committee meetings;
- directing and evaluating the internal audit function;
- reviewing internal and external audit reports to ensure that any potential major deficiencies or breakdowns in controls or procedures may be identified and that prompt action is taken by management;
- liaising with the external auditors and ensuring that the annual statutory audit, half-year and quarterly limited reviews are conducted in an effective manner;
- reviewing internal controls and recommending enhancements;
- reviewing Consolidated Entity accounting policies and practices; and

- reviewing the consolidated financial report.

The Audit Committee meets with the external auditors during the year to review the adequacy of existing external audit arrangements, with particular emphasis on the scope and quality of the audit. The Committee then reports to the Board on the external auditors' continuance and achievement of their terms of engagement.

The Principal Board Audit Committee is supported by regional audit committees and management committees in the areas in which the Consolidated Entity conducts its business activities. Audit committees are comprised of non-executive directors of the relevant operating companies within the Consolidated Entity.

Compensation & Nomination Committee

During the year, the Company established a Compensation & Nomination Committee.

The members of the Committee at the date of this Report are:

Dr ED Tweddell (Chairman)
Dr KJ Moss
Mr MR Rayner

The responsibilities of the Compensation & Nomination Committee are to:

- Monitor, review and make recommendations to the Board as necessary and appropriate regarding:
  - Frame the objectives for and subsequently assess the performance of the Chief Executive;
  - the compensation arrangements for the Chief Executive Officer and other senior executives, including incentive plans, other benefits and service contracts;
  - the remuneration policies and practices of the Company generally;
  - option and share schemes or other incentive schemes for executives or other employees;
  - the remuneration arrangements for non-executive members of the Board.
- Make grants of options pursuant to the National Australia Bank Executive Share Option Scheme from time to time on such conditions (not inconsistent with the provisions of the Scheme) as the Committee may, in its absolute discretion, think fit, where prior in-principle approval had been given by the Board to the grants contemplated on each occasion.

  Undertake all acts, matters, resolutions or things necessary or desirable in connection with the making of these grants.
- Review and make recommendations to the Board as appropriate regarding:
  - The size and composition of the Board;
  - The criteria for Board membership and desirable specifications of qualifications, experience and domicile for individual new appointees to the Board;
  - Identification of potential candidates for appointment to the Board.
- Review the Terms of Reference and composition of the Committee annually.

Risk Management

The Board is committed to the identification and quantification of risk throughout the Company's business units and controlled entities. Directors receive regular reports from the Group Risk Management division on areas where significant business risk or exposure concentrations may exist, and on the management of these risks. The Board Committee structures, including the Committees established to consider large credit facilities, form an important part of the risk management process.

More comprehensive details on risk management appear on pages 37 to 40 of this financial report.

Ethical Standards

The operations of the Company and the Consolidated Entity are driven by the Group Mission Statement and Values. All the Values are important and cover every aspect of daily banking and financial service practices.

The Values include the requirement that the business be conducted ethically and with professionalism to achieve the highest standards of behaviour. This Value is reinforced by the Company's internal Code of Conduct, which is provided to all staff members and which requires observance of strict ethical guidelines. The Code of Conduct covers:

- Personal conduct;
- Honesty;
- Relations with customers;
- Prevention of fraud;
- Financial advice to customers;
- Conflict of interest; and
- Disclosure.

In addition, the directors of the Company support the Code of Conduct issued by the Australian Institute of Company Directors.

Report of the Directors

The Directors of National Australia Bank Limited (hereinafter referred to as the Company or the National) present their report together with the financial report of the Company and of the Consolidated Entity, being the Company and its controlled entities, for the year ended September 30, 2000 and the Audit Report thereon.

Directors

The Board has power to appoint persons as Directors to fill any vacancies. Other than the Managing Director, one third (or the nearest number to but not exceeding one third) are required to retire by rotation at each Annual General Meeting, together with any Director appointed during the year to fill any vacancy. Both the Directors retiring by rotation and any newly appointed Directors are eligible to stand for re-election or election.

Details of Directors of the Company in office at the date of this Report, and each Director's qualifications, experience and special responsibilities are below:

Mr Mark Rayner
BSc (Hons), FTSE, FAusIMM, FAICD, FIE Aust

Mr Rayner has been Chairman since September 1997 and an independent non-executive Director since 1985. He is a member of the Principal Board Audit Committee and the Compensation and Nomination Committee.

Experience
35 years with Comalco Limited, including 11 years as Chief Executive, 20 years as a Director and 6 years as Deputy Chairman, Group Executive and Director of CRA Limited until 1995.

Other Directorships
Boral Limited and Vice President of the Australian Academy of Technological Sciences and Engineering Limited, and the Australia Japan Business Co-operation Committee. Also Chairman of the Australia Japan Business Forum, Pasminco Limited and Mayne Nickless Limited.

Mr Charles Allen
AO, MA, MSc, FTSE, FAICD

Mr Allen has been an independent non-executive director since 1992. He is a member of the Principal Board Audit Committee and Chairman of National Australia Investment Capital Limited.

Experience
35 years in the petroleum industry including 21 years with Shell International and 14 years as Managing Director of Woodside Petroleum Limited until 1996.

Other Directorships
Amcor Limited, The Australian Gas Light Company (AGL), Air Liquide Australia Limited and Earthwatch.

Chairman of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and the Cambridge Australia Trust.

Mr Frank Cicutto
BCom, FAIBF, FCIBS

Mr Cicutto, the Managing Director and Chief Executive Officer, was appointed to the Board as an executive director in 1998. He is a Director of National Wealth Management Holdings Limited, MLC Holdings Limited, MLC Limited, National Australia Financial Management Limited, O;-e Limited, Bank of New Zealand, HomeSide International, Inc., Michigan National Bank, Michigan National Corporation and Chairman of National Australia Group Europe Limited.

Experience
32 years in banking and finance in Australia and internationally. Previous executive positions include Head of Credit Bureau, State Manager New South Wales, Chief Executive Clydesdale Bank and Chief General Manager, Australian Financial Services. Appointed Executive Director and Chief Operating Officer in July 1998, and appointed Managing Director and Chief Executive Officer in June 1999.

Other Directorships
Melbourne Business School Limited (University of Melbourne) and Chairman of the Australian Bankers' Association.

Mr Graham Kraehe
BEc

Mr Kraehe was appointed an independent non-executive director in 1997. He is Chairman of O;-e Limited.

Experience
38 years in the wine, automotive and diversified manufacturing industries. Managing Director of Pacifica Limited from 1985 until 1994. Managing Director and Chief Executive Officer of Southcorp Limited since 1994.

Other Directorships
Business Council of Australia and a director and chairman of various entities in the Southcorp Group in Australia, New Zealand, North America and Europe.

Dr Kenneth Moss
BE, PhD, FIEAust, CPEng, FAICD

Dr Moss was appointed an independent non-executive director in August 2000. He is a member of the Principal Board Compensation and Nomination Committee.

Experience
35 years in the mining, engineering, marine and hardware industries with BHP and the Howard Smith Group, including 7 years as Managing Director of Howard Smith Limited until July 2000.

Other Directorships
GPT Management Limited, Hunter Area Health Services, Hunter Medical Research Institute, Australian Maritime Safety Authority, an advisory board member of the Graduate School of Business at the University of Newcastle and Chairman of Boral Limited and Centennial Coal Company Limited.

Mr Geoffrey Tomlinson
BEc

Mr Tomlinson joined the Board as an independent non-executive director in March 2000. He is Chairman of National Wealth Management Holdings Limited, MLC Holdings Limited, MLC Limited and National Australia Financial Management Limited.

Experience: 29 years with the National Mutual Group (now AXA), 6 years as Group Managing Director and Chief Executive Officer until 1998.

Other Directorships
Amcor Limited, Mirrabooka Investments Limited, Telecorp Limited and Pineapplehead Limited. Chairman of Reckon Limited, Funtastic Limited, Medweb Limited and Programmed Maintenance Services Limited. Deputy Chairman of Neverfail Springwater Limited and Hansen Technologies Limited. He is a non-executive consultant to PricewaterhouseCoopers.

Dr Edward Tweddell
BSc, MBBS (Hons), FRACGP, FAICD

Dr Tweddell was appointed an independent non-executive director in 1998. He is a Director of Opi-e Limited and Chairman of National Asset Management Ltd and the Principal Board Compensation and Nomination Committee.

Experience
24 years in the pharmaceutical and health care industries. Group Managing Director and Chief Executive Officer of FH Faulding & Co Limited since 1993.

Other Directorships
Chairman of Faulding Inc. and various subsidiaries in the Faulding Group in Australia, New Zealand, Asia, Europe and North America.

Mrs Catherine Walter
LLB (Hons), LLM, MBA, FAICD

Mrs Walter joined the Board in 1995 as an independent non-executive Director. She is Chairman of the Principal Board Audit Committee and a director of National Wealth Management Holdings Limited, MLC Holdings Limited, MLC Limited and National Australia Financial Management Limited. She is also a member of the Board Audit Committee of National Australia Financial Management Limited.

Experience
20 years as a solicitor and 8 years as a partner in the firm Clayton Utz until 1994, including some time as Managing Partner of the Melbourne office.

Other Directorships
Australian Stock Exchange Limited, Melbourne Business School Limited, Orica Limited, Vodafone Pacific Limited, Committee for Economic Development of Australia, a council member of The University of Melbourne and Chairman of the Business Regulation Advisory Group.

Board Changes

Details of other Directors, who have been Directors of the Company at any time during or since the end of the year, are listed below.

There were a number of changes in the composition of the Board of Directors during the year. In accordance with the Company's Constitution, Mr DK Macfarlane and Dr GM Deeley retired from the Board having reached the normal retirement age of 70 years. Mr TP Park and Mr WF Blount stood down as Directors and Mr GA Tomlinson and Dr KJ Moss were appointed as Directors.

Mr Macfarlane joined the Board in 1985 and was elected Vice Chairman in 1992. He served as Chairman of the Principal Board Audit Committee, and as Chairman of National Asset Management Ltd during a time of considerable business expansion. Mr Macfarlane retired on March 27, 2000.

Dr Deeley joined the Board in 1992. He served as a member and Chairman of the Principal Board Audit Committee, and Chairman of the Australia New Zealand Regional Audit Committee. Dr Deeley retired as a Director on September 1, 2000.

The Board thanks David Macfarlane and Michael Deeley for their significant contributions.

Mr Park, who joined the Board in 1996, resigned following his executive appointment with Southcorp Holdings Limited. Given that the Managing Director of Southcorp, Mr GJ Kraehe, was also a Director of the Company, Mr Park tendered his resignation as a matter of good corporate governance, with effect from February 29, 2000. Mr Kraehe has subsequently announced his intention to retire from Southcorp and Mr Park has been nominated Managing Director to succeed him.

Mr Blount, who joined the Board of the Company in March 1999, resigned, effective July 1, 2000, following his appointment as Chairman and Chief Executive Officer of Cypress Communications Inc, a telecommunications company based in Atlanta in the United States. Mr Blount's resignation from the Board of the Company, was due to the time commitments of his new role.

The Board thanks Tom Park and Frank Blount for their contributions.

Mr Tomlinson was appointed as a Director of the Company on March 22, 2000. He has also been appointed Chairman of National Wealth Management Holdings Limited, the wholly owned holding company of the Company's global funds management and insurance operations. His previous roles include Group Managing Director and Chief Executive Officer of National Mutual Holdings Limited from 1992 to 1998.

Dr Moss was appointed as a Director of the Company on August 23, 2000, following his retirement as Managing Director of Howard Smith Limited. He was also appointed a member of the Principal Board Compensation & Nomination Committee.

Indemnification

Since the end of the previous financial year, the Company has not indemnified, or made a relevant agreement for indemnifying, against a liability any present or former officer or auditor of the Company or any of its related bodies corporate as contemplated by subsections 300(11), (8) and (9) of the Corporations Law, other than to enter into deeds providing for indemnity, insurance and access to documents with the Directors of the Company in accordance with a resolution of the shareholders at the Annual General Meeting held on December 17, 1998 and similar deeds in favour of certain officers.

Insurance

During the financial year, the Company paid a premium under a contract insuring each of certain officers of the Company and its

Directors' Interests

The table below shows the interests of each Director in the issued and paid up capital of the Company and registered schemes of the Consolidated Entity as at the date of this report.

	Ordinary Shares		*Options over Ordinary Shares*	*Notional Income Securities*		*Registered Schemes*	
	Held Beneficially	*Held Non-Beneficially*	*Held Beneficially*	*Held Beneficially*	*Held Non-Beneficially*	*Held Beneficially*	*Held Non-Beneficially*
MR Rayner	21,008	-	-	-	-	-	-
DCK Allen	11,594	-	-	-	-	-	-
GA Tomlinson	5,000	-	-	500	-	-	-
FJ Cicutto*	39,647	-	1,300,000	-	-	-	-
GJ Kraehe	12,026	-	-	670	-	-	-
KJ Moss	2,000	-	-	-	-	-	-
ED Tweddell	2,376	-	-	-	-	-	-
CM Walter	14,542	-	-	400	-	-	-

** Inclusive Staff Share Scheme Issues*

All of the Directors have disclosed interests in organisations not related to the Consolidated Entity, and are to be regarded as interested in any contract or proposed contract that may be made between the Company and any such organisations.

Dated at Melbourne, Australia this 2nd day of November, 2000 and signed in accordance with a resolution of the Directors.

MR Rayner

FJ Cicutto

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Balance Sheet

As at September 30 Dollars in Millions	Note	Consolidated			The Company		
		2000	1999	1998	2000	1999	1998
Assets							
Cash and short-term liquid assets	9	6,868	3,649	4,152	772	928	1,519
Due from other financial institutions	10	12,780	11,120	9,303	9,803	7,516	5,465
Due from customers on acceptances	11	22,945	22,851	22,353	21,953	21,903	21,371
Trading securities	12	15,113	12,853	11,446	13,819	11,761	9,396
Available for sale securities	13	3,047	1,599	937	2,823	1,211	749
Investment securities	14	7,452	8,951	8,228	2,986	5,508	5,341
Investments relating to life insurance business	15	31,103	-	-	-	-	-
Loans and advances	16	195,492	165,610	160,001	107,488	91,103	82,921
Mortgage loans held for sale		2,656	1,980	3,673	-	-	-
Mortgage servicing rights	19	8,226	5,345	2,998	-	-	-
Due from controlled entities		-	-	-	37,365	22,684	20,745
Shares in entities and other securities	20	1,376	1,068	1,013	11,225	5,463	5,383
Regulatory deposits	21	135	153	1,155	12	6	961
Fixed assets	22	2,437	2,033	2,219	832	575	544
Goodwill	23	2,617	2,905	3,095	-	-	-
Other assets	24	31,431	14,155	21,341	19,133	8,539	13,688
Total Assets		343,677	254,081	251,714	228,211	177,287	169,081
Liabilities							
Due to other financial institutions	25	19,685	16,203	16,541	25,688	13,304	11,675
Liability on acceptances	11	22,945	22,851	22,353	21,953	21,903	21,371
Life insurance policy liabilities	26	29,879	-	-	-	-	-
Deposits and other borrowings	27	185,097	162,468	158,084	107,320	94,128	84,739
Income tax liability	28	2,920	1,979	1,953	803	856	756
Provisions	29	2,154	1,743	1,680	1,596	1,361	1,182
Due to controlled entities		-	-	-	20,106	13,032	13,313
Bonds, notes and subordinated debt	30	21,051	13,637	15,115	17,437	11,287	12,735
Other debt issues	31	1,907	1,645	1,683	461	383	421
Other liabilities	32,33	26,632	15,235	18,541	17,263	8,859	12,174
Total Liabilities		322,270	235,561	235,950	212,427	165,113	158,366
Net Assets		21,407	18,520	15,764	15,784	12,174	9,715
Shareholders' Equity							
Issued and paid-up capital	34	9,855	9,286	6,675	9,855	9,286	6,675
Reserves	34	2,806	802	1,782	230	207	206
Retained profits		9,500	8,432	7,304	5,699	2,681	2,834
Shareholders' equity attributable to members of the Company		21,361	18,520	15,761	15,784	12,174	9,715
Outside equity interests in controlled entities	35	46	-	3	-	-	-
Total Shareholders' Equity		21,407	18,520	15,764	15,784	12,174	9,715

Contingent liabilities and commitments are excluded from the Balance Sheet and are listed in Note 41.

The Consolidated Balance Sheet includes the assets and liabilities of the statutory funds of the Consolidated Entity's life insurance businesses which are subject to restrictions under the Life Insurance Act 1995. Refer to Note 1 for further details.

1 Principal Accounting Policies

In this financial report, National Australia Bank Limited, the 'Parent Entity', is referred to as 'the Company', and the 'Consolidated Entity' consists of the Company and all entities in which it has control. The consolidated financial statements comprise the financial statements of the Consolidated Entity.

The financial report is a general purpose financial report which is prepared in accordance with the requirements of the Banking Act, Corporations Law, Australian Accounting Standards, Urgent Issues Group Consensus Views and other authoritative pronouncements of the Australian Accounting Standards Board.

The financial report also includes disclosures required by the United States Securities and Exchange Commission (SEC) in respect of foreign registrants. Other prescribed SEC disclosures, which are not required to be included in the financial report, are presented elsewhere in this annual financial report.

The preparation of the financial report requires management to make estimates and assumptions that affect the reported amount of assets, liabilities, revenues and expenses and the disclosed amount of contingent liabilities. Although the Consolidated Entity has internal control systems in place to ensure that estimates can be reliably measured, actual amounts may differ from those estimates. It is not anticipated that such differences would be material.

Historical cost

The financial report is based on historical cost and therefore does not reflect changes in the purchasing power of money or current valuations of non-monetary assets, except:

- certain non-monetary assets which are reflected at independent valuation; and
- the assets and liabilities of life insurance businesses' funds which are measured at net market value and net present value respectively (refer to Principles of Consolidation below).

Currency of presentation

All amounts are expressed in Australian currency and all references to '$' are to Australian dollars unless otherwise stated.

Rounding of amounts

In accordance with Australian Securities and Investment Commission (Class Order 98/100 dated July 10, 1998) all amounts have been rounded to the nearest million dollars, except where indicated.

Changes in accounting policy

(i) Life insurance business

Effective October 1, 1999, the Consolidated Entity adopted Australian Accounting Standard AASB 1038 "Life Insurance Business". The Standard requires all life insurance assets and liabilities to be carried at net market value, and the first time consolidation of policyholder assets, liabilities, revenues and expenses into the Consolidated Entity's result. In addition, the excess of the net market value over the net assets of life insurance companies controlled entities is required to be recognised as an asset, with any subsequent revaluation movements reflected in the profit and loss accounts.

On initial adoption of the Standard at October 1, 1999, the Consolidated Entity's assets increased by $4,930 million and liabilities increased by $4,838 million with a corresponding increase of $58 million in retained earnings. The adjustment in retained earnings represented the unrealised gains on life insurance company investments in controlled entities from prior years. The Consolidated Entity has tax effected these unrealised gains to reflect the potential tax liability of $31 million.

For the year ended September 30, 2000, the impact of the change in accounting policy was an increase to the Consolidated Entity's profit before tax of $79 million. This represented the movement in the excess of the net market value over the net assets of the life insurance company's controlled entities which were held by the Consolidated Entity at October 1, 1999.

Comparatives have not been disclosed as it is impracticable to do so.

(ii) Income recognition on non-accrual loans

Effective April 1, 2000, the Consolidated Entity changed its accounting policy in relation to income recognition on non-accrual loans which are contractually past due. The previous policy applied cash receipts on non-accrual loans against the carrying value of the loans and did not recognise these receipts in the profit and loss account as interest income until the principal had been fully repaid. The revised accounting policy recognises cash receipts on non-accrual loans as income in the profit and loss account in priority over principal, except where the cash receipts relate to proceeds from the sale of security or are scheduled principal repayments.

The change in accounting policy achieves conformity with Australian Prudential Regulation Authority (APRA) guidelines (Prudential Statement G.1. Asset Quality).

The change had no net impact on operating profit after tax for the year ended September 30, 2000, nor is there any cumulative financial effect requiring disclosure of restated prior reporting period comparative information.

Principles of consolidation

All entities which are 'controlled' by the Company are consolidated in the financial report. Control means the ability or power of the Company to dominate decision making directly or indirectly in relation to the financial and operating policies of another entity, to enable that other entity to operate with it in pursuing its objectives.

All inter-entity balances, transactions and profits are eliminated on consolidation. Controlled entities prepare accounts for consolidation in conformity with the Company's accounting policies.

Where controlled entities have been acquired or sold during the year, their operating results have been included from the date of acquisition or to the date of sale. Controlled entity acquisitions have been accounted for using the purchase method of accounting.

Statutory funds of life insurance operations have been consolidated into this financial report for the first time, as required by Australian Accounting Standard AASB 1038 "Life Insurance Business". The financial report consolidates all the assets, liabilities, revenues and expenses of the statutory funds and non-statutory fund life insurance operations irrespective of whether they are designated as relating to the policyholders or to the shareholders.

Associates are entities over which the Company exerts significant influence but does not exert control. Associates are accounted for utilising the cost method with only dividends received or receivable recognised in profit and loss. When applied to the Consolidated Entity, the impact of this method does not differ significantly from accounting for associates under the equity method.

Asset quality

The Consolidated Entity has disclosed, in Note 18, certain components of its loan portfolio as impaired assets according to the classifications discussed below.

Non-accrual loans which consist of:

- all loans against which a specific provision has been raised;
- loans which are contractually past due 90 days with security insufficient to cover principal and arrears of interest;
- restructured loans where the interest rate charged is lower than the Consolidated Entity's average cost of funds;
- loans not included above, that are maintained on a cash basis because of a significant deterioration in the financial performance or position of the borrower; and
- impaired off-balance sheet credit exposures where current circumstances indicate that losses may be incurred.

Restructured loans are those loans on which the original contractual terms have been concessionally modified due to the financial difficulties of borrowers, and on which interest continues to be accrued at a rate which is equal to or greater than the Consolidated Entity's average cost of funds at the date of restructuring.

Assets acquired through security enforcement are those assets (primarily real estate) acquired through actual foreclosure or in full or partial satisfaction of loans.

Income recognition on non-accrual loans

When a loan is classified as non-accrual, income ceases to be recognised in the profit and loss account on an accruals basis as reasonable doubt exists as to the collectability of interest and principal. Interest charged on non-accrual loans in the current reporting period is reversed against income.

Cash receipts in relation to non-accrual loans are recognised as interest income to the extent that the cash receipts represent unaccrued interest except where there is a contrary agreement with the customer, the receipts relate to proceeds from the sale of security, or are scheduled principal repayments.

Mortgage loans held for sale

Mortgage loans held for sale are carried at the lower of aggregate cost or fair value. Fair value is based on the contract prices at which the mortgage loans will be sold or, if the loans are not committed for sale, the current market price. Deferred hedge gains and losses on risk management hedge instruments are included in the cost of the mortgage loans held for sale for the purpose of determining the lower of aggregate cost or fair value. Mortgage loans held for resale are typically sold within three months.

Mortgage servicing rights

Mortgage servicing rights are the rights to receive a portion of the interest coupon and fees collected from the mortgagor for performing specified servicing activities. The total cost of loans originated or acquired is allocated between the mortgage servicing rights and the mortgage loans without the servicing rights, based on relative fair values. The value of servicing rights acquired through bulk transactions is capitalised at cost.

Mortgage servicing rights are amortised in proportion to and over the period of estimated net servicing revenue. They are evaluated for impairment by comparing the carrying amount of the servicing rights to their fair value. Fair value is estimated using market prices of similar mortgage servicing assets and discounted future net cash flows considering market prepayment rates, historic prepayment rates, portfolio characteristics, interest rates and other economic factors. For purposes of measuring impairment, the mortgage servicing rights are stratified by the predominant risk characteristics which include product types of the underlying loans and interest rates of the mortgage notes. Impairment is recognised through a valuation reserve for each impaired stratum and is included in the amortisation of mortgage servicing rights.

Shares in entities

Except where a life insurance controlled entity consolidates a subsidiary (as detailed in Investments relating to life insurance business), shares in entities are stated at original cost less any necessary provision for diminution in value, or at Directors' valuation. Unrealised losses relating to diminution in the value of shares in entities are recognised in the profit and loss account.

Other assets

Where a life insurance controlled entity consolidates a subsidiary, any difference between the values consolidated line by line and the market value of the subsidiary recorded in the life insurer's financial report is shown as "excess of the interest of life insurance entities in their controlled entities over their recognised net assets". This excess represents:

- acquired goodwill to the extent it remains at reporting date;
- increases in the value of goodwill of the subsidiary since acquisition or establishment; and
- differences between the values assigned to the assets and liabilities of the subsidiary within the Consolidated Entity financial report and those in the financial report of the subsidiary, arising due to valuation methodology differences.

The excess is not amortised. Movements in the excess of interest of life insurance entities in their controlled entities over their recognised net assets are included in consolidated Other Operating Income.

Fixed assets

Except for life insurance business investments, all land and buildings are revalued annually by Directors to reflect current market values. Directors' valuations are based on advice received from independent valuers on an existing use basis. Independent valuations are carried out on a three-year cycle on an existing use basis. Revaluation increments are credited to the Asset Revaluation Reserve. To the extent that they reverse previous revaluation increments, revaluation decrements are charged against the Asset Revaluation Reserve.

A provision for capital gains tax is only provided when it is known that the asset will eventually be sold. This provision, when required, is made against the Asset Revaluation Reserve.

All other fixed assets and land and buildings acquired since the last revaluation are carried at the lower of cost, less accumulated depreciation, and recoverable amount.

If the carrying amount of a fixed asset exceeds its recoverable amount, the asset is written down to the lower value. In assessing recoverable amounts, the relevant cash flows have not been discounted to their present value unless otherwise stated.

The costs of developing, acquiring and enhancing internal use software are capitalised and amortised over the estimated useful life of the software which ranges from three to five years.

3 Segment Information

The following segment information is disclosed in accordance with Australian Accounting Standard AASB 1005 'Financial Reporting by Segments' and Statement of Financial Accounting Standards No 131 "Disclosures about Segments of an Enterprise and Related Information" (SFAS 131) effective from October 1, 1998. Under AASB 1005 and SFAS 131, an operating segment is defined as a component of an enterprise about which separate financial information is available that is evaluated regularly by the chief operating decision maker, or decision making group, in assessing performance. The Consolidated Entity results are based on the operating segments as reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior management. Each segment is organised based on similar products and services provided globally to customers or activities undertaken solely for the Consolidated Entity's own account, and managed by individuals who report directly to the Managing Director and Chief Executive Officer.

On May 4, 2000 the National announced changes to its corporate structure. Broadly, the new structure brings together existing growth businesses, high potential global businesses, and the various services required to support them.

The Consolidated Entity's business is organised into six major operating segments: Business and Personal Financial Services, Wealth Management, Specialist and Emerging Businesses, Wholesale Financial Services, HomeSide and National Shared Services. Business and Personal Financial Services is the retailing arm of the National Group and provides a full range of financial services to customers across all regions and segments. Wealth Management provides protection, insurance and investment products to safeguard and improve customers' income, assets and lives. Its operations include funds management, life insurance, funds under administration and investment management. Specialist and Emerging Businesses comprise five product specialist units, being Cards, Payments, Leasing and Asset Finance, Securities Services and International Trade & Business Finance, together with National Online Trading and National Australia Investments Capital. Wholesale Financial Services is responsible for managing the National's relationships with large corporations, institutions and government bodies worldwide. It comprises four divisions including Global Markets, Corporate & Institutional Financial Services, Project & Structured Finance and Wholesale Support Services. HomeSide is the Consolidated Entity's international product specialist responsible for coordinating mortgage origination and servicing activities and the creation of mortgage backed securities sold in secondary markets. National Shared Services combines operational services, Financial Shared Services, Human Resources Shared Services and Information Technology, to form a 'true' shared services organisation with improved productivity and lower costs. The 'other' category includes ye and the Corporate Centre. O_e became operational in April 2000 to create and accelerate 'new economy' lines of business. The Corporate Centre focuses on strategic and policy direction for the Group and incorporates Risk Management, People and Culture, Finance & Planning, Corporate & Technology strategy and the Office of the CEO.

The accounting policies of the segments are, in all material respects, consistent with those described in Note 1 'Principal Accounting Policies'. Operating revenues and expenses directly associated with each operating segment are included in determining their operating result. Transactions between operating segments are based on agreed recharges between segments operating within the same country and arm's length terms between segments operating in different countries.

Comparatives for the current basis of segmentation are not provided as it is impracticable to do so. In addition, it is impracticable to provide current period segment information for the previous years' basis of segmentation. Consequently, segment information for 1999 is provided for the operating segments defined in that year. Additionally, comparatives for 1998 have not been provided as the changes to the management operations and structure have been so significant that they render any disclosure on the old management structure for 1998 an ineffective comparison. The operating profit after tax for the 1998 segments were as follows: Banking $1,857 million; Finance and Life Insurance $132 million and Merchant and Investment Banking $45 million.

Consolidated

For the year ended September 30, 2000

Dollars in Millions

	Business & Personal Financial Services	*Wealth Management* [1]	*Wholesale Financial Services*	*Specialist and Emerging Businesses*	*HomeSide*	*National Shared Services*	*Other* [2]	*Intersegment Eliminations*	*Total*
Net interest income	5,253	(8)	508	546	(42)	(104)	212	-	6,371
Charge to provide for doubtful debts	458	-	17	98	58	(21)	(23)	-	589
Non interest income	2,383	1,866	787	772	657	37	21	-	6,523
Inter-segment revenue	175	-	8	205	-	1,539	161	(2,088)	-
Total operating income	7,353	1,858	1,284	1,432	557	1,493	417	(2,088)	12,305
Other operating expenses	2,365	1,259	390	549	361	1,623	365	-	7,092

Segment information (continued)

Consolidated

For the year ended September 30, 2000

Dollars in Millions

	Business & Personal Financial Services	Wealth Management [1]	Wholesale Financial Services	Specialist and Emerging Businesses	HomeSide	National Shared Services	Other [2]	Intercompany Eliminations	Total
Goodwill	-	-	-	-	-	-	197	-	197
Inter-segment expenses	1,471	23	107	412	7	81	(13)	(2,088)	-
Operating profit before tax, abnormals and outside equity interests	3,517	476	787	471	189	(211)	(152)	-	5,077
Income tax expense	1,200	181	192	161	57	(69)	(22)	-	1,700
Operating profit after tax before abnormals & outside equity interests	2,317	295	595	310	132	(142)	(130)	-	3,377
Abnormal items	(86)	(108)	(12)	-	-	1	1	-	(204)
Tax on abnormal items	(28)	(37)	(3)	-	-	-	-	-	(68)
Operating profit after tax and abnormal items	2,259	224	586	310	132	(141)	(129)	-	3,241
Outside equity interests	-	2	-	-	-	-	-	-	2
Operating profit after tax and outside equity interests	2,259	222	586	310	132	(141)	(129)	-	3,239
Total assets	172,910	33,478	107,402	12,379	16,194	2,723	(1,409)	-	343,677

Consolidated

For the year ended September 30, 1999

Dollars in Millions

	Business & Personal Financial Services	Products and Services	Wholesale Financial Services	HomeSide	Information Technology	Other [2]	Intercompany Eliminations	Total
Net interest income	4,791	430	379	103	(14)	377	-	6,066
Charge to provide for doubtful debts	517	89	(52)	12	-	15	-	581
Non interest income	2,262	934	658	568	1	140	-	4,563
Inter-segment revenue	227	670	5	-	558	106	(1,566)	-
Total operating income	6,763	1,945	1,094	659	545	608	(1,566)	10,048
Other operating expenses	2,483	1,544	300	410	605	565	-	5,907
Inter-segment expenses	1,042	335	136	4	-	49	(1,566)	-
Operating profit before tax and outside equity interests	3,238	66	658	245	(60)	(6)	-	4,141
Income tax expense	1,108	(2)	107	92	(23)	39	-	1,321
Operating profit after tax and outside equity interests	2,130	68	551	153	(37)	(45)	-	2,820
Outside equity interests	-	(1)	-	-	-	-	-	(1)
Operating profit after tax and outside equity interests	2,130	69	551	153	(37)	(45)	-	2,821
Total assets	141,492	11,046	86,380	10,631	302	4,230	-	254,081

[1] *Refer to Note 53 for Life Insurance disclosures relating to policyholder and shareholder revenues, expenses, assets and liabilities.*

[2] *Consists of non operating units which comprise of corporate centre functions, goodwill amortisation and the Consolidated Entity's funding. The year ended September 30, 2000 also includes the Oz-e operating segment. These segments are not considered to be reportable operating segments under SFAS 131.*

Geographical Segments

The Consolidated Entity has operations in Australia, its country of domicile, New Zealand, the United Kingdom, the United States, the Republic of Ireland and certain Asian countries.

The allocation of assets, income and profit is based on the geographical location in which transactions are booked. There are no material inter-segment transactions.

	Consolidated					
For the years ended September 30	*2000*	*%*	*1999*	*%*	*1998*	*%*
Dollars in Millions						
Assets[1]						
Australia	185,748	54.3	126,296	49.7	124,106	49.3
United Kingdom	70,256	20.4	54,689	21.5	59,339	23.6
Republic of Ireland	4,892	1.4	4,049	1.6	4,649	1.8
United States	44,799	13.0	32,768	12.9	30,454	12.1
New Zealand	25,465	7.4	24,195	9.5	23,128	9.2
Asian countries	12,517	3.6	12,084	4.8	10,038	4.0
Total	343,677	100.0	254,081	100.0	251,714	100.0
Total Operating Revenue						
Australia	12,385	51.5	9,223	47.0	8,792	45.4
United Kingdom	5,488	22.8	4,919	25.1	5,121	26.4
Republic of Ireland	279	1.2	286	1.4	321	1.7
United States	3,192	13.3	2,770	14.1	2,168	11.2
New Zealand	2,126	8.8	1,772	9.3	2,157	11.1
Asian countries	570	2.4	657	3.1	821	4.2
Total	24,040	100.0	19,629	100.0	19,380	100.0
Operating Profit After Tax and Outside Equity Interests						
Australia	1,646	50.8	1,394	49.4	1,092	54.2
United Kingdom	792	24.5	721	25.6	470	23.3
Republic of Ireland	12	0.4	40	1.4	7	0.3
United States	490	15.1	383	13.6	234	11.5
New Zealand	294	7.8	240	8.5	189	9.4
Asian countries	45	1.4	43	1.5	22	1.2
Total	3,239	100.0	2,821	100.0	2,014	100.0

[1] *Includes monetary bonds assets of $32 billion at September 30, 2000.*

4 Operating Profit Before Income Tax Expense

	Consolidated			The Company		
For the years ended September 30	*2000*	*1999*	*1998*	*2000*	*1999*	*1998*
Dollars in Millions						
Operating profit is determined after including:						
Income						
Interest Income						
Other financial institutions	691	451	643	482	326	479
Marketable debt securities	1,465	1,366	1,249	1,035	939	926
Loans to customers[1]	13,854	12,198	12,484	7,242	6,125	5,957
Controlled entities	-	-	-	1,308	886	817
Other sources (incl. regulatory deposits, interest on swaps etc.)	1,507	1,201	1,047	1,118	848	811
Total Interest Income	17,517	15,066	15,423	11,315	9,124	9,287

40 Particulars in Relation to Controlled Entities

The following table highlights those controlled entities with contributions to consolidated operating profit of $5 million or more, or those that are deemed to be of particular interest.

Entity Name	*Incorporated in*	*Nature of Business*
National Australia Bank Limited	Australia	Banking
Controlled Entities of National Australia Bank Limited		
National Equities Limited	Australia	Parent entity
National Americas Investment, Inc.	United States of America	Parent entity
HomeSide Investment, Inc.	United States of America	Parent entity
HomeSide International, Inc.	United States of America	Parent entity
HomeSide Lending, Inc.	United States of America	Mortgage lender and servicer
National Wealth Management Holdings Limited	Australia	Parent entity
National Australia Financial Management Limited	Australia	Parent entity
National Australia Fund Management Limited	Australia	Life insurance
National Asset Management Limited	Australia	Funds management
County Investment Management Limited	Australia	Funds management
MLC Holdings Limited	Australia	Parent entity
MLC Lifetime Company Limited	Australia	Life insurance
MLC Limited and its controlled entities	Australia	Life insurance
Other MLC Holdings Limited controlled entities	Australia	Life insurance and fund management
GWM Adviser Services Limited	Australia	Financial planning
National Corporate Investment Services Limited	Australia	Financial planning
MLC Corporate Services Asia Pte Limited	Hong Kong	Financial planning
IMD Management Limited	Australia	Service entity
National Wealth Management Services Limited	Australia	Parent entity
National Australia Management Services Limited	Australia	Service entity
MLC Management Limited	Australia	Service entity
National Australia Group (NZ) Limited	New Zealand	Parent entity
Bank of New Zealand	New Zealand	Banking
BNZ Finance Limited	New Zealand	Registered bank
BNZ Investments Limited	New Zealand	Investment company
BNZ Property Investments Limited and its controlled entities	New Zealand	Property company
BNZ Life Insurance Limited	New Zealand	Life insurance
Other BNZ Investments Limited controlled entities	New Zealand	Property company, investment company
National Australia Group Europe Limited	England	Parent entity
Clydesdale Bank PLC (Group)	Scotland	Banking
Clydesdale Bank Equity Limited	Scotland	Venture/development
Clydesdale Bank Insurance Brokers Limited	Scotland	Insurance brokers and nominee entity
National Americas Holdings Limited	England	Parent entity
Michigan National Corporation	United States of America	Parent entity
Michigan National Bank and its controlled entities	United States of America	Banking
Custom Fleet Limited (Formerly Eden Vehicle Rentals Limited)	England	Vehicle contract hire
National Australia Life Company Limited	England	Life insurance
National Australia Group Europe Services Limited	Scotland	Computer services
National Australia Group Europe Investments Limited	Scotland	Investment company
National Irish Holdings Limited	England	Parent entity
National Irish Bank Limited and its controlled entities	Republic of Ireland	Banking
Northern Bank Limited	Northern Ireland	Banking
Northern Bank Financial Services Limited	Northern Ireland	Parent entity
Northern Bank Development Corporation Limited and its controlled entities	Northern Ireland	Merchant bank
Yorkshire Bank PLC	England	Banking
Yorkshire Bank Retail Services Limited and its controlled entity	England	Finance entity
Yorkshire Bank Home Loans Limited	England	Mortgage finance
National Australia Group Services Limited	Australia	Parent entity - finance provider
Custom Service Leasing Limited	Australia	Serviced lease finance

Entity Name	*Incorporated in*	*Nature of Business*
NBA Properties Limited and its controlled entities	Australia	a Property owner
CSFL Securities Pty Limited	Australia	Finance provider
National Australia Merchant Bank (Singapore) Limited	Singapore	Merchant bank
National Australia Corporate Services Limited	Australia	a Parent entity
Nasulus Insurance Pte Limited	Singapore	General insurer under restricted licence
National Markets Group Limited	Australia	Parent entity
Australian Market Automated Operation (Ausmax) System Limited	Australia	On-line client investment administration service
National Australia Finance (Asia) Limited	Hong Kong	Money lender
National Australia Trustees Limited and its controlled entity	Australia	Trustee entity

Beneficial interest in the shares of all entities listed above is 100%.

a) *These controlled entities and their fixed hereunder have entered into a deed of cross guarantee (refer Note 41(d) for details) with the Company (National Australia Bank Limited) pursuant to Australian Securities and Investment Commission Class Order 98/1418 dated August 13, 1998. The controlled entities and the Company form a Closed Group (a Closed Group is defined as a group of entities comprising a holding entity and its related wholly-owned entities). Relief, therefore, was granted to these controlled entities from the Corporations Law requirements for preparation, audit and publication of an annual financial report.*

ARDH Limited
Australia Banks Export Re-Finance Corporation Limited
CBC Investments Limited
CBC Investment Services Limited
Commercial Nominees Pty Limited
Grosvenor Limited
Nominet Nominees (London) Limited
National Australia Investment Brokers Limited
National Australia Leasing (Qld) Pty Limited
NBA Leasing Pty Limited
VPL Securities Pty Limited

b) *Curzon Service Leasing Limited has entered into a deed of cross guarantee with National Australia Group Services Limited pursuant to Australian Securities and Investment Commission Class Order 98/1418, dated August 13, 1998. The Class Order provides relief to Curzon Service Leasing Limited from the Corporations Law requirements for preparation, audit and publication of accounts.*

41 Contingent Liabilities and Credit Commitments

	Consolidated				*The Company*			
	Notional Amount [a]		*Credit Equivalent* [a]		*Notional Amount* [a]		*Credit Equivalent* [b]	
As at September 30	*2000*	*1999*	*2000*	*1999*	*2000*	*1999*	*2000*	*1999*
Dollars in Millions								
Contingent Liabilities (a)								
Guarantees	2,676	2,389	2,676	2,389	6,481	4,559	6,481	4,559
Standby letters of credit	5,649	3,337	5,649	3,337	4,391	2,381	4,391	2,381
Bill endorsements	2	-	2	-	1	-	1	-
Documentary letters of credit	711	409	124	56	494	377	103	105
Performance related contingencies	2,494	2,260	1,247	1,130	1,728	1,335	864	668
Other	273	230	273	230	167	136	167	136
Total Contingent Liabilities	11,805	8,625	9,971	7,142	13,263	8,788	12,008	7,849
Credit Related Commitments (b)								
Outright forward purchases and forward deposits	3,349	2,661	3,349	2,661	155	20	155	20
Underwriting facilities	132	202	66	101	132	202	66	101
Other binding credit commitments	77,664	63,572	16,594	13,932	53,169	42,971	12,984	10,744
Total Credit Related Commitments	81,145	66,435	20,009	16,694	53,456	43,193	13,205	10,865

The Consolidated Entity has shared its exposure on letters of credit with other financial institutions to the extent of $15 million credit equivalent (1999: $13 million). This amount is not included in the above figures. The Consolidated Entity has recourse arrangements with customers and others in respect of the major portion of the remaining contingent liabilities.

Liquidity Risk

Liquidity risk arises from the possibility that market conditions prevailing at some point in the future will force the Consolidated Entity to sell derivative positions at a value which is far below their underlying worth, or may result in the inability to exit from the positions. The liquidity of a derivative, or an entire market, can be reduced substantially as a result of some market event or change in market psychology, or the actions of individual participants.

In order to counter such risk, the Consolidated Entity concentrates its derivative activity in highly liquid markets. Table 5, for example, shows that approximately 39% (1999: 45%) of notional principal outstanding was represented by standard foreign exchange and interest rate futures contracts.

Special considerations apply in the case of interest rate and cross currency swaps. These are often specially tailored instruments whose cash flows are structured to suit the particular needs of individual clients. Such instruments have the appearance of illiquidity because hedging the position with another counterparty with exactly offsetting requirements would be an unlikely occurrence.

However, the Consolidated Entity hedges the risks of customised swap structures by using a combination of other instruments. Swaps, forward rate agreements, futures contracts, physical securities or even loans and deposits can be employed for this purpose. In other words, such swaps may appear illiquid, but their component risks are not. Furthermore, other market participants will always be willing to provide liquidity to an instrument they are able to hedge.

In addition, values at risk utilisations (Table 2) ensure that open positions are maintained at a very small level relative to total volume. Such levels ensure that, at a time of market stress, the Consolidated Entity would not be forced to compete for ever diminishing liquidity in order to dispose of, or hedge, its existing positions.

43 Fair Value of Financial Instruments

Disclosed below is the estimated fair value of the Consolidated Entity's financial instruments presented in accordance with the requirements of Statement of Financial Accounting Standards No. 107 "Disclosures about Fair Value of Financial Instruments" (SFAS 107) and Australian Accounting Standard AASB 1033 "Presentation and Disclosure of Financial Instruments" (AASB 1033).

A financial instrument is defined by SFAS 107 as cash, evidence of an ownership interest in an entity, or a contract that creates a contractual obligation or right to deliver to or receive cash or another financial instrument from a second entity on potentially favourable or unfavourable terms.

The following disclosures include all financial instruments other than items exempted from the provisions of the standard such as leases, controlled and associated entity investments and pension fund obligations. The disclosures also exclude the effect of any premium or discount that may result from concentrations of ownership of a financial instrument, possible tax consequences, estimated transaction costs that may result from bulk sales or the relationships that may exist between various financial instruments.

There are various limitations inherent in this disclosure. First, it excludes a wide range of intangible, franchise and relationship benefits which are integral to a full assessment of the Consolidated Entity's financial position and the value of its net assets. Of prime significance among these exclusions, is the inability to assign a premium to non-interest bearing and call (ie. current account) deposits, notwithstanding that such deposits represent a stable source of long-term funding to the Consolidated Entity. The value of that premium is positively correlated with interest rates - it increases as interest rates rise. However, an interest rate rise will adversely affect the valuation of those longer term fixed rate financial assets which are, in part, funded by those deposits. Therefore, in the absence of any recorded increase in the premium value of such deposits, SFAS 107 disclosures will tend to indicate an interest rate sensitivity within the Consolidated Entity which in reality may not exist.

Additionally, some items are excluded from the SFAS 107 and AASB 1033 requirements even where they may be bought and sold in the market. For example, the intangible value of credit card receivables relationships represent the value attributable to a credit card customer base, and are based on the expected duration of customer relationships. Recorded sales of credit card receivables in other entities indicate that this intangible carries significant premium market value. This market value has not been recognised in the disclosure below.

Furthermore, the valuation of other loans and deposits which, as explained below, generally involved the use of discounted cash flow techniques takes no account of the value to the Consolidated Entity of the customer relationships so formed and on which the Consolidated Entity's continued financial health depends.

Finally, although management has employed its best judgment in the estimation of fair values, there is inevitably a significant element of subjectivity involved in the calculations. This is particularly so in the case of those financial instruments which are non performing or which, like the majority of the Consolidated Entity's financial assets and liabilities, have a thin or non-existent market. Therefore, the fair value estimates presented below are not necessarily indicative of the amounts the Consolidated Entity could have realised in a sales transaction at September 30

Methodologies

The methodologies and assumptions used depend on the terms and risk characteristics of the various instruments and include the following:

Liquid assets

The carrying values of certain on-balance sheet financial instruments approximate fair values. These include cash and short-term liquid assets, due to and from other financial institutions, acceptances outstanding and customers' acceptance liability, and accrued interest receivable and payable. These financial instruments are short-term in nature and the related amounts approximate fair value or are receivable or payable on demand.

Debt securities

The fair values of Trading, Investment, and Available for Sale securities, together with any related hedge contracts where applicable, are based on quoted market prices at September 30, 2000.

Investments relating to life insurance business

The fair values of debt and equity securities are based on quoted market prices at September 30, 2000. Where no quoted market values exist, various valuation methods are adopted by the directors as detailed in Note 1. In those cases, the values adopted are deemed equivalent to net market value.

Loans and advances

The fair value of loans and advances that reprice within six months of balance date is assumed to equate to the carrying value. The fair value of all other loans and advances were calculated using discounted cash flow models based on the maturity of the loans. The discount rates applied in this exercise were based on the current interest rates of similar types of loans, if the loans were performing at reporting date.

Mortgage loans held for sale

The fair value of mortgage loans held for sale is based on the sale contract prices or if not committed for sale, the current market price.

Mortgage servicing rights

The fair value of mortgage servicing rights is derived using market prices of similar assets and discounted future net cash flows based on economic factors such as market and historic prepayment rates, portfolio characteristics and interest rates.

Shares in entities and other securities

The fair value of shares in entities and other securities was based on quoted market prices where available. Where quoted market prices did not exist, the fair values were estimated after taking into account the underlying financial position of the investee or quoted market prices for similar instruments.

Regulatory deposits

The Consolidated Entity is required by law, in several of the countries in which it operates, to lodge regulatory deposits with the local central bank at a rate of interest below that generally prevailing in that market. As the obligation between the parties is not based on contract but on regulatory requirements, such deposits do not constitute a financial instrument within the definition contained in SFAS 107 and have been included in the table for Australian reporting purposes.

Deposits and other borrowings

As noted above, the fair value of non-interest bearing, call and variable rate deposits and fixed rate deposits repricing within six months was the carrying value at September 30. The fair value of other term deposits was calculated using discounted cash flow models, based on the deposit type and its related maturity.

Life insurance policy liabilities

The fair value of the policy liabilities was calculated using the Margin on Services methodology as detailed in Note 1.

Bonds, notes and subordinated debt/other debt issues

The fair value of bonds, notes and subordinated debt was calculated based on quoted market prices. For those debt issues where quoted market prices were not available, a discounted cash flow model using a yield curve appropriate to the remaining maturity of the instrument was used.

The fair value of off-balance sheet financial instruments that qualify as accounting hedges for the Consolidated Entity's long-term debt was included in the fair value amount of the hedged debt.

Commitments to extend credit, letters of credit and guarantees, warranties and indemnities issued

These financial instruments are generally not sold nor traded and estimated fair values are not readily ascertainable. Fair value of these items was not calculated for the following reasons. First, very few of the commitments extending beyond six months would commit the Consolidated Entity to a predetermined rate of interest. Secondly, the fees attaching to these commitments are the same as those currently charged to enter into similar arrangements. Finally, the quantum of fees collected under these arrangements, upon which a fair value calculation would be based, is not material.

Other off-balance sheet financial instruments

The fair values of foreign exchange contracts, interest rate swaps, interest rate and currency option contracts, and currency swaps were obtained from quoted market prices, discounted cash flow models or option pricing models as appropriate.

The fair values of these instruments are disclosed in Note 42, "Derivative Financial Instruments".

Summary

The following table provides comparison of carrying and fair values for each item discussed above, where applicable.

	Carrying Value [1]	*Fair Value* [2]	*Carrying Value* [1]	*Fair Value* [2]
As at September 30		*2000*		*1999*
Dollars in Millions				
Financial Assets				
Liquid assets	6,868	6,868	3,649	3,649
Due from other financial institutions	12,780	12,780	11,120	11,120
Due from customers on acceptances	22,945	22,945	22,851	22,851
Debt securities	25,611	25,594	23,203	23,224
Investments relating to life insurance business				
Equity securities	19,077	19,077	-	-
Debt securities	9,189	9,189	-	-
Loans and advances	182,945	184,788	155,216	158,240
Mortgage loans held for sale	2,656	2,654	1,980	1,986
Mortgage servicing rights	8,226	8,226	5,345	5,416
Regulatory deposits [3]	135	135	153	153
Lease finance [3]	13,818	13,796	11,367	11,994
Shares in entities and other securities	1,376	1,425	1,068	1,134
Total Financial Assets	305,626	307,477	235,952	239,767
Financial Liabilities				
Due to other financial institutions	29,685	29,685	16,203	16,203
Liability on acceptances	22,945	22,945	22,851	22,851
Deposits and other borrowings	195,097	185,148	162,468	162,470
Life insurance policy liabilities	29,879	29,879	-	-
Bonds, notes and subordinated debt	21,051	21,356	13,437	13,295
Other debt issues	1,907	2,490	1,645	1,996
Total Financial Liabilities	290,564	291,503	216,604	216,815

[1] *The credit risk on financial assets of the Consolidated Entity is their carrying value as listed above.*

[2] *The net fair value of the financial assets and liabilities are materially the same as the fair values disclosed above.*

[3] *For the purposes of SFAS 107 disclosures, lease finance and regulatory deposits are excluded from the definition of financial assets and have been included in this table for Australian reporting purposes.*

Directors' Declaration

The Directors of National Australia Bank Limited declare that:

1. (a) the financial statements, and the notes thereto, as set out on pages 55 to 162, comply with accounting standards and the Corporations Law.
   (b) the financial statements and notes thereto give a true and fair view of the financial position as at September 30, 2000, and of the performance of the Company and the Consolidated Entity for the year ended September 30, 2000; and
   (c) in the opinion of the Directors, at the date of this declaration, there are reasonable grounds to believe that the Company will be able to pay its debts as and when they become due and payable.

2. There are reasonable grounds to believe that the Company and certain controlled entities will, as a Consolidated Entity, be able to meet any obligations or liabilities to which they are or may become subject by virtue of the Deed of Cross Guarantee between the Company and those controlled entities pursuant to Australian Securities and Investment Commission Class Order 98/1418 dated August 13, 1998 (refer to Notes 40 and 41 to the financial statements for further details).

Dated at Melbourne this 2nd day of November, 2000 and signed in accordance with a resolution of the Board of Directors.

MR Rayner

FJ Cicutto

Auditors' Report

Independent Auditors' Report to the Members of National Australia Bank Limited

Scope

We have audited the financial report of National Australia Bank Limited for the financial year ended September 30, 2000 consisting of the profit and loss statements, balance sheets, statements of cash flows, accompanying notes (1 to 55), and the directors' declaration. The financial report includes the consolidated financial statements of the Consolidated Entity, comprising the Company and the entities it controlled at the end of the year or from time to time during the financial year. The Company's directors are responsible for the financial report. We have conducted an independent audit of this financial report in order to express an opinion on it to the members of the Company.

Our audit has been conducted in accordance with the Auditing Standards of Australia and the United States of America to provide reasonable assurance whether the financial report is free of material misstatement. Our procedures included examination, on a test basis, of evidence supporting the amounts and other disclosures in the financial report, and the evaluation of accounting policies and significant accounting estimates. These procedures have been undertaken to form an opinion whether, in all material respects, the financial report is presented fairly in accordance with Accounting Standards and other mandatory professional reporting requirements and statutory requirements in Australia so as to present a view which is consistent with our understanding of the Company's and the Consolidated Entity's financial position, and performance as represented by the results of their operations and their cash flows.

The audit opinion expressed in this report has been formed on the above basis.

Audit Opinion

In our opinion, the financial report of National Australia Bank Limited is in accordance with:

(a) the Corporations Law, including:

  (i) giving a true and fair view of the Company's and the Consolidated Entity's financial position as at September 30, 2000, 1999 and 1998, and of their performance of the financial years ended on those dates, and
  (ii) complying with Accounting Standards and Corporations Regulations, and

(b) other mandatory professional reporting requirements.

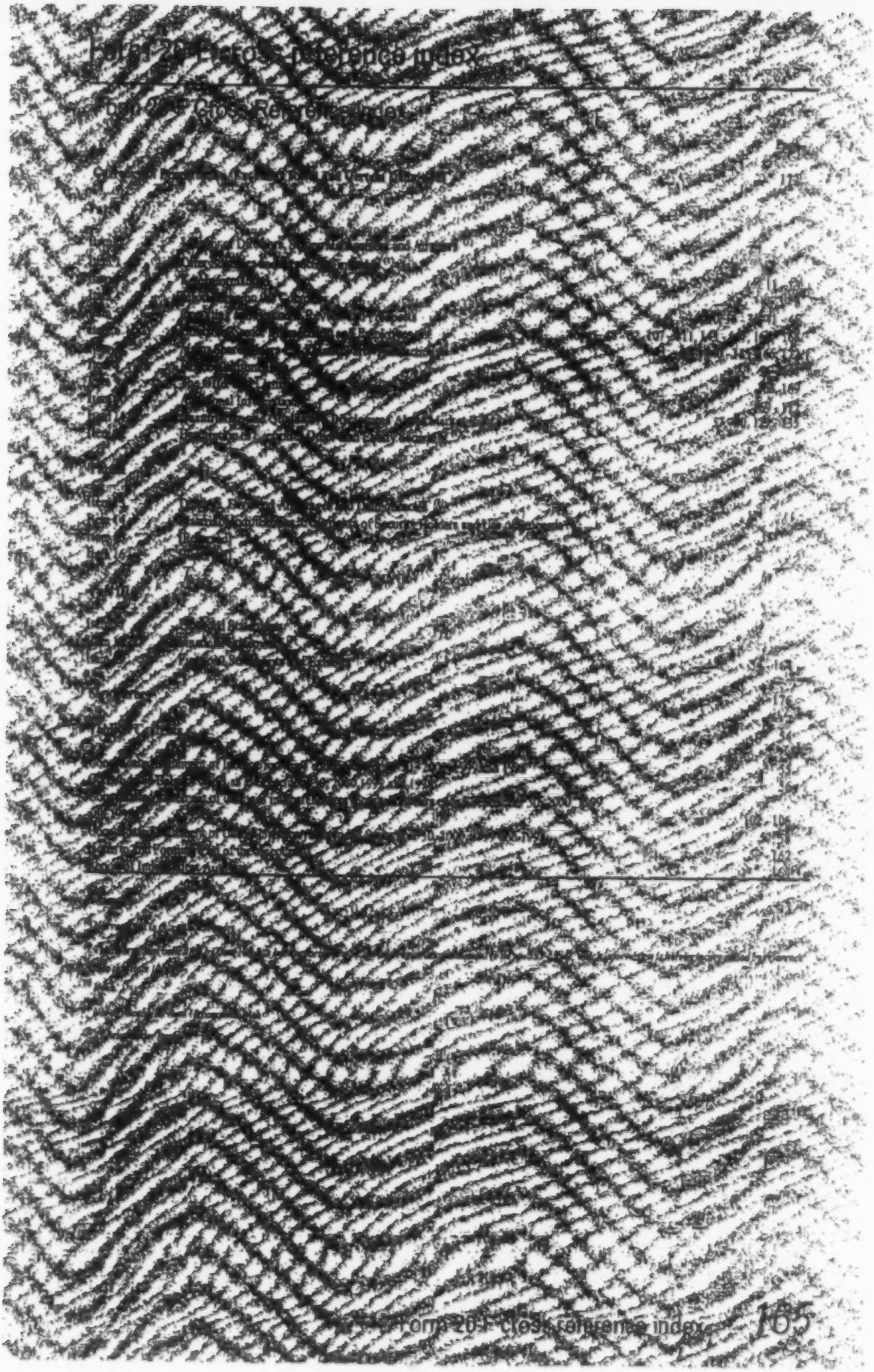
Accounting principles generally accepted in Australia vary in certain respects from accounting principles generally accepted in the United States of America. An explanation of the major differences between the two sets of principles is presented in Note 54 to the financial statements. The application of the United States principles would have affected the determination of consolidated net profit for each of the three years in the period ended September 30, 2000 and the determination of consolidated financial position as of September 30, 2000, 1999 and 1998 to the extent summarised in Note 54 to the financial statements.

Signed at Melbourne on this 2nd day of November, 2000.

KPMG

KPMG
Chartered Accountants

CD Lewis
Partner



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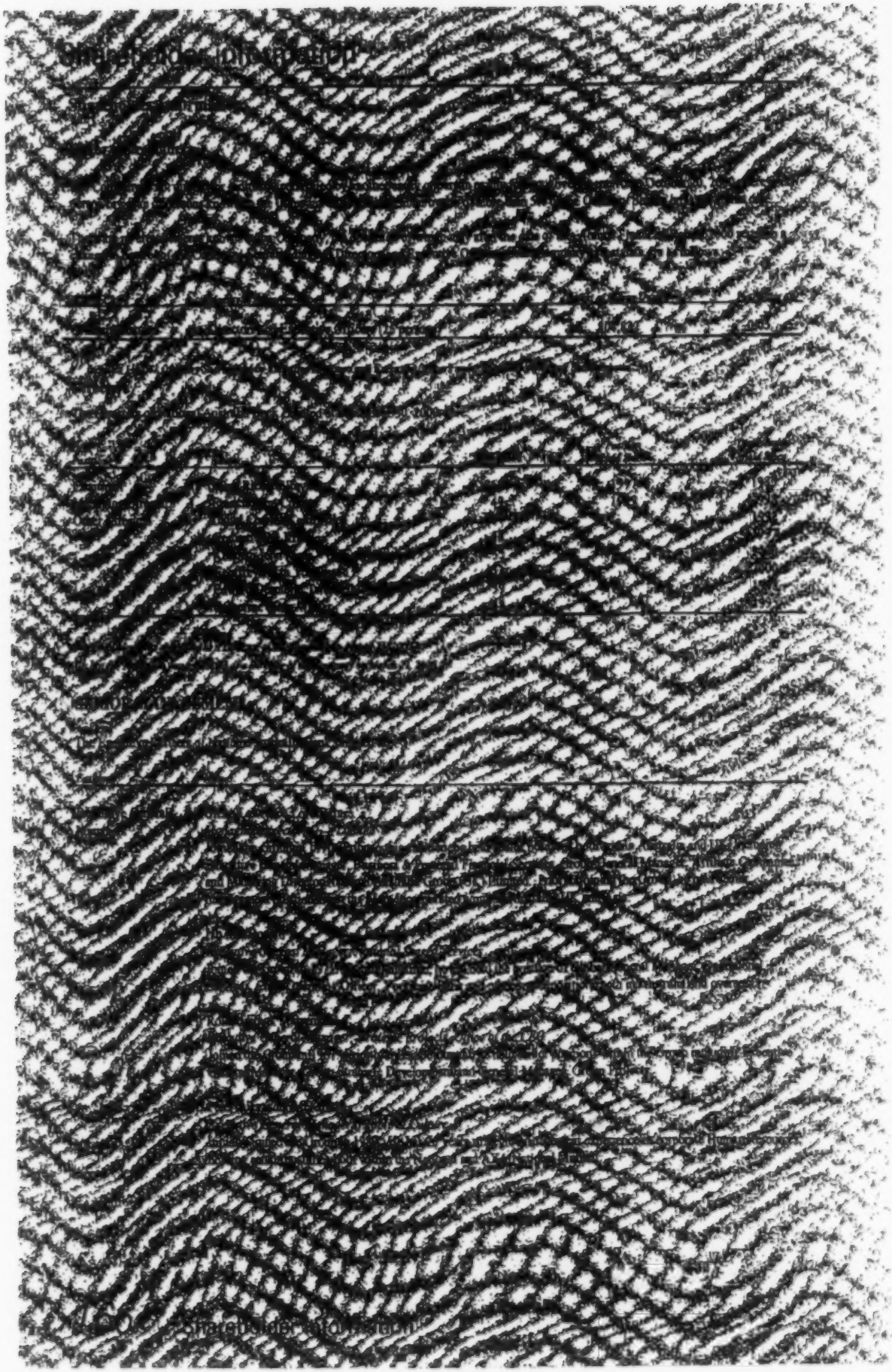

Company Secretary — Garry Francis Nolan
Joined the Group in 1970. He has senior management experience in financial management, capital markets, corporate strategy, new business development, corporate restructuring, Board affairs, corporate governance, shareholder services and globalisation of business. Prior to joining the Group, he obtained branch banking experience with a major commercial bank and corporate restructuring with a firm of chartered accountants.

The Directors of the Company are classified as either Executive or Non-Executive, with the former being those Directors engaged in the full-time employment of the Company. Mr FJ Cicutto is the only Executive Director.

The aggregate remuneration paid by the Company and its subsidiaries during the year ended September 30, 2000 to all Directors and Executive Officers listed above as a group (25 persons in 2000 and 24 persons in 1999) was $20 million (1999: $18 million).

During the year ended September 30, 2000, Share Options were issued to 605 executives covering a total of 11,435,500 share options. A total of 3,075,000 options were issued to the 18 of the 25 Directors and Officers listed above as a group.

TRADING MARKET AND PRICE HISTORIES

Ordinary Shares

The Ordinary Shares are listed for trading on the Australian Stock Exchange Limited, a self-regulatory organisation which governs the open market quotation, purchase and sale of the Ordinary Shares in Australia. The Australian Stock Exchange Limited is the principal market for the Ordinary Shares, and operates in the following cities in Australia: Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart.

The Ordinary Shares are also listed for quotation on the London Stock Exchange Limited; the London Stock Exchange Automated Quotation System; the Stock Exchange, New Zealand; and the Tokyo Stock Exchange. American Depository Shares and preference shares are listed on the New York Stock Exchange (refer below).

The following table sets forth, for the calendar quarters indicated, the high and low sale prices of the Ordinary Shares as reported by the Australian Stock Exchange Limited.

	2000		1999		1998		1997	
	High $	Low $	High $	Low $	High $	Low $	High $	Low $
March Quarter	23.59	19.88	28.85	24.40	22.70	18.93	17.22	14.37
June Quarter	27.90	21.50	30.28	24.48	23.40	20.55	19.05	15.20
September Quarter	27.70	23.70	25.75	21.61	23.50	19.95	22.85	18.60
December Quarter[1]	27.40	25.51	25.72	22.23	25.04	18.99	21.95	16.87

[1] The 2000 December quarter represents the period from October 1 to October 20.

On October 20, 2000 the closing price on the Australian Stock Exchange Limited was $26.76 per Ordinary share, with 1,514,639,412 Ordinary Shares (excluding partly-paid shares) outstanding and such shares were held by 301,592 holders.

October 2000		September 2000		August 2000		July 2000		June 2000		May 2000	
High $	Low $	High $	Low $	High $	Low $	High $	Low $	High $	Low $	High $	Low $
27.40	25.51	25.90	23.70	26.50	24.55	27.70	24.20	27.90	25.20	26.20	23.36

American Depositary Shares (ADSs)

The Ordinary Shares are traded in the United States in the form of ADSs evidenced by American Depositary Receipts (ADRs) issued by The Bank of New York, as Depositary, pursuant to an Amended and Restated Deposit Agreement dated as of November 14, 1997, or Morgan Guaranty Trust Company of New York, its predecessor Depositary, pursuant to a Deposit Agreement dated January 16, 1987, as amended as of June 24, 1988. Each ADS represents five Ordinary Shares. The ADSs are listed on the New York Stock Exchange (the 'NYSE'), which is the principal market in the United States for the trading of the ADSs. The ADSs trade on the NYSE under the symbol 'NAB'. At October 20, 2000 4,163,575 ADSs representing 20,817,875 Ordinary Shares, or approximately 1.4% of the Ordinary Shares outstanding on such date, were held by 208 holders with registered addresses in the United States. The following table sets forth, for the calendar quarters indicated, the high and low sale prices per ADS as reported on the NYSE composite tape.

	2000		1998		1997	
	High US$	Low US$	High US$	Low US$	High US$	Low US$
March Quarter	76.63	61.31	90.69	76.31	73.88	65.38	66.13	56.13
June Quarter	83.06	65.56	97.69	80.44	76.38	61.25	72.75	60.05
September Quarter[1]	82.00	65.31	83.94	70.13	73.25	59.06	81.25	68.25
December Quarter	73.00	69.13	81.88	71.81	77.00	57.06	71.00	66.44

[1] The 2000 December quarter represents the period from October 1 to October 20.

United States Federal Income Taxation

A US Holder must include in gross income the gross amount of any dividend paid by the Company out of earnings and profits (as determined for United States federal income tax purposes), including any Australian income tax withheld from the dividend payment. The dividend will not be eligible for the dividends-received deduction generally allowed to United States corporations in respect of dividends paid by United States corporations. Subject to certain limitations, any Australian tax withheld from a dividend will be creditable against a US Holder's United States federal income tax liability.

For United States Federal income tax purposes, US Holders will not be entitled to a tax credit for the 10% UK withholding tax deducted from dividends paid by the United Kingdom subsidiary.

Currency of presentation, exchange rates and certain definitions

All dollar amounts are expressed in Australian dollars unless otherwise stated. Merely for the convenience of the reader, this Annual Financial Report contains translations of certain Australian dollar amounts into US dollars at specified rates. These translations should not be construed as representations that the Australian dollar amounts actually represent such US dollar amounts or could be converted into US dollars at the rate indicated. Unless otherwise stated, the translations of Australian dollars into US dollars have been made at the rate of US$0.5415=A$1.00, the noon buying rate in New York City for cable transfers in Australian dollars as certified for customs purposes by the Federal Reserve Bank of New York (the 'Noon Buying Rate') on September 29, 2000.

Exchange Rates

Fluctuations in the exchange rate between the Australian dollar and the US dollar will affect the US dollar equivalent of the Australian dollar prices of the Ordinary Shares and, as a result, may affect the market price of the ADSs in the United States. Such fluctuations will also affect the US dollar conversion by the Depositary of cash dividends paid in Australian dollars on the Ordinary Shares represented by the ADSs (see "American Depositary Shares" on page 168 for a description of the ADSs). For each of the Company's fiscal years, the high, low, average and year-end Noon Buying Rates, see "Selected Financial data for five years ended September 30, 2000" on page 13.

Certain Definitions

The Company's fiscal year ends on September 30. As used herein, the fiscal year ended September 30, 2000 is referred to as 2000 and other fiscal years are referred to in a corresponding manner. 'Financial Statements' means the Company's consolidated Financial Statements for the years ended September 30, 2000, September 30, 1999 and September 30, 1998 included herein at pages 54 to 163. Any discrepancies between total and sums of components in tables contained in this Annual Financial Report 2000 are due to rounding.

REGISTERED SHAREHOLDERS OF THE COMPANY AS AT OCTOBER 20, 2000

	Number of Shares	%
Chase Manhattan Nominees Limited	180,147,992	11.9
National Nominees Limited	134,593,602	8.9
Westpac Custodian Nominees Limited	81,296,273	5.4
ANZ Nominees Limited	53,383,681	3.5
Perpetual Trustee Australia Group	46,430,552	3.1
Citicorp Nominees Pty Limited	27,348,962	1.8
Permanent Trustee Group	24,824,016	1.7
Commonwealth Custodial Services Limited	24,094,282	1.6
AMP Group	23,264,756	1.5
Queensland Investment Corporation	21,069,576	1.4
MLC Limited	19,284,623	1.3
National Australia Trustees Limited	18,108,890	1.2
Perpetual Nominees Limited	11,239,179	0.7
HKBA Nominees Limited	11,151,385	0.7
Mercantile Mutual Life Insurance Group	10,725,009	0.7
AMP Nominees Pty Limited	10,247,165	0.7
NRMA Nominees Pty Limited	9,368,162	0.6
National Mutual Group	8,234,271	0.5
Australian Foundation Investment Company Limited	6,773,400	0.5
BT Custodial Services Pty Limited	6,337,491	0.4
	727,923,267	48.1

The 20 largest registered shareholders held 727,923,267 shares which is equal to 48.1% of the total issued capital of 1,514,639,412 Ordinary Shares.

As at October 20, 2000 there was no person or group of persons known to the Company to be the beneficial owner of more than 15 per cent of the Ordinary Shares on issue at that date.

Distribution of Shareholdings

	Number of Shareholders	% of Holders	Number of Shares	% of Shares
Range				
1 - 1,000	185,500	61.5	76,411,659	5.0
1,001 - 5,000	91,934	30.5	199,240,016	13.2
5,001 - 10,000	14,283	4.7	99,670,173	6.6
10,001 - 100,000	9,410	3.1	201,123,366	13.3
100,001 and over	465	0.2	938,194,198	61.9
	301,592	100.0	1,514,639,412	100.0
Less than marketable parcel of $500	8,573	2.8		
Address of Holders				
Australia	281,429	93.3	1,489,889,235	98.4
United Kingdom	11,398	3.8	7,652,085	0.5
New Zealand	5,981	2.0	11,193,976	0.7
United States	441	0.1	969,138	0.1
Other Overseas	2,343	0.8	4,934,578	0.3
	301,592	100.0	1,514,639,412	100.0

Voting Rights

The Company's Constitution provides in summary that every member (and person entitled under Article 6.1, the transmission Article) present in person or by proxy, attorney or representative at a general meeting of shareholders shall have one or more votes as follows

On a show of hands – one vote
On a poll – one vote for each share held.

Where a member appoints two proxies that specify different ways to vote on a resolution, the proxy must not vote in a show of hands

REGISTERED NATIONAL INCOME SECURITY HOLDERS AS AT OCTOBER 20, 2000

	Number of Securities	%
Commonwealth Custodial Services Limited	750,735	3.7
National Nominees Limited	597,524	3.0
Perpetual Trustee Aust Group	584,770	2.9
Australian Foundation Investment Company Limited	506,160	2.5
Lincorp Nominees Pty Limited	373,482	1.9
AMP Group	313,760	1.6
University Of Melbourne	235,040	1.2
MLC Limited	219,545	1.1
Eight Charter Services Pty Limited	200,000	1.0
Tower Trust Limited	192,288	1.0
National Mutual Group	170,000	0.8
UBS Warburg Private Clients Nominees Pty Limited	155,008	0.8
Melbourne Square Pty Limited	150,000	0.8
Murrabooka Investments Limited	150,000	0.8
BT Custodial Services Pty Limited	148,763	0.7
Permanent Trustee Australia Limited	116,000	0.6
Merrill Lynch (Australia) Nominees Pty Limited	115,701	0.6
Treaty Services Pty Limited	111,500	0.5
Djerriwarrh Investments Limited	103,640	0.5
University Of Western Australia	100,000	0.5
	5,293,966	26.5

The 20 largest registered National Income Security holders held 5,293,966 National Income Securities which is equal to 26.5% of the total issue of 20,000,000 National Income Securities

Shareholder information (continued)

Distribution of Securities

	Number of Holders	*% of Holders*	*Number of Securities*	*% of Securities*
Range				
1 - 1,000	47,049	96.7	7,833,668	39.2
1,001 - 5,000	1,333	2.8	2,945,756	14.7
5,001 - 10,000	119	0.2	890,200	4.5
10,001 - 100,000	121	0.3	3,505,542	17.5
100,001 and over	19	*	4,824,834	24.1
	48,641	100.00	20,000,000	100.0
Less than marketable parcel of $500	6	0.01		
Address of Holders				
Australia	48,559	99.8	19,946,180	99.7
United Kingdom	13	*	12,812	0.1
New Zealand	27	0.1	14,395	0.1
United States	5	*	1,880	*
Other Overseas	37	0.1	24,733	0.1
	48,641	100.0	20,000,000	100.0

** due to the small numbers of these security holders the amounts round down to nil.*

Voting Rights

National Income Securities comprise a fully paid note and an unpaid Preference Share. The Company's constitution and the terms of issue of the Preference Shares provide, in summary, that holders of the Preference Shares will not be entitled to vote at a general meeting except they may:

- vote together with the holders of Ordinary Shares on certain limited resolutions; and
- vote as a class on any resolution to vary the rights attaching to the Preference Shares,

in which case the holders of the Preference Shares have the same rights as to voting in respect of each Preference Share as those conferred on the holders of Ordinary Shares in respect of each Ordinary Share and will have one vote per Preference Share.

National Australia Bank Limited

Chairman

Mr MR Rayner
BSc (Hons), FTSE, FAusIMM, FAICD
FTSAust

Managing Director and Chief Executive Officer

Mr FJ Cicutto
Bcom, FAIBF, FCIBS

Company Secretary

Mr GF Nolan
Mbus, FCIS, FAIBE, FAICD, ASIA, CFTP

Registered Office Principal Share Register & Shareholder Services

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Melbourne Victoria 3001
Australia

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Telephone (outside Australia)
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Fax (outside Australia)
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Website: www.national.com.au

United Kingdom Branch Share Register

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United Kingdom
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Fax: (0870) 703 6101
Website: www.computershare.com

United States ADR Depositary, Transfer Agent and Registrar

The Bank of New York
ADR Department
101 Barclay Street
New York NY 10286
United States
Tel: (212) 815 5918
Fax: (212) 571 3050
Toll Free (US only): 1 888 269 2377
Website: www.adrbny.com

Solicitors

Mallesons Stephen Jaques
525 Collins Street
Melbourne Victoria 3000
Australia

Auditors

KPMG
Chartered Accountants
161 Collins Street
Melbourne Victoria 3000
Australia

Shareholder's Centre

To ensure shareholders are fully informed about their investment, a separate section of the National's web site has been dedicated to shareholders. Called the Shareholder's Centre, the site contains a range of information including copies of recent result announcements, the Annual Financial Report and useful forms from our Shareholder Services.

The National's web site can be found at
Website: www.national.com.au

Official Quotation

National Australia Bank Limited is quoted on the following exchanges:

The Australian Stock Exchange;
The London Stock Exchange;
The Stock Exchange, New Zealand;
Tokyo Stock Exchange; and
New York Stock Exchange

In the United States the Company's ordinary shares are traded in the form of American Depositary Shares (ADSs) evidenced by American Depositary Receipts (ADRs) issued by The Bank of New York.

The Company has also issued:

Exchangeable Capital Units which are listed under the symbol 'NAU' on the New York Stock Exchange Inc., and are also listed on the Luxembourg Stock Exchange

Trust Units Exchangeable for Preference Shares which are listed under the symbol 'NAB Pr' on the New York Stock Exchange.

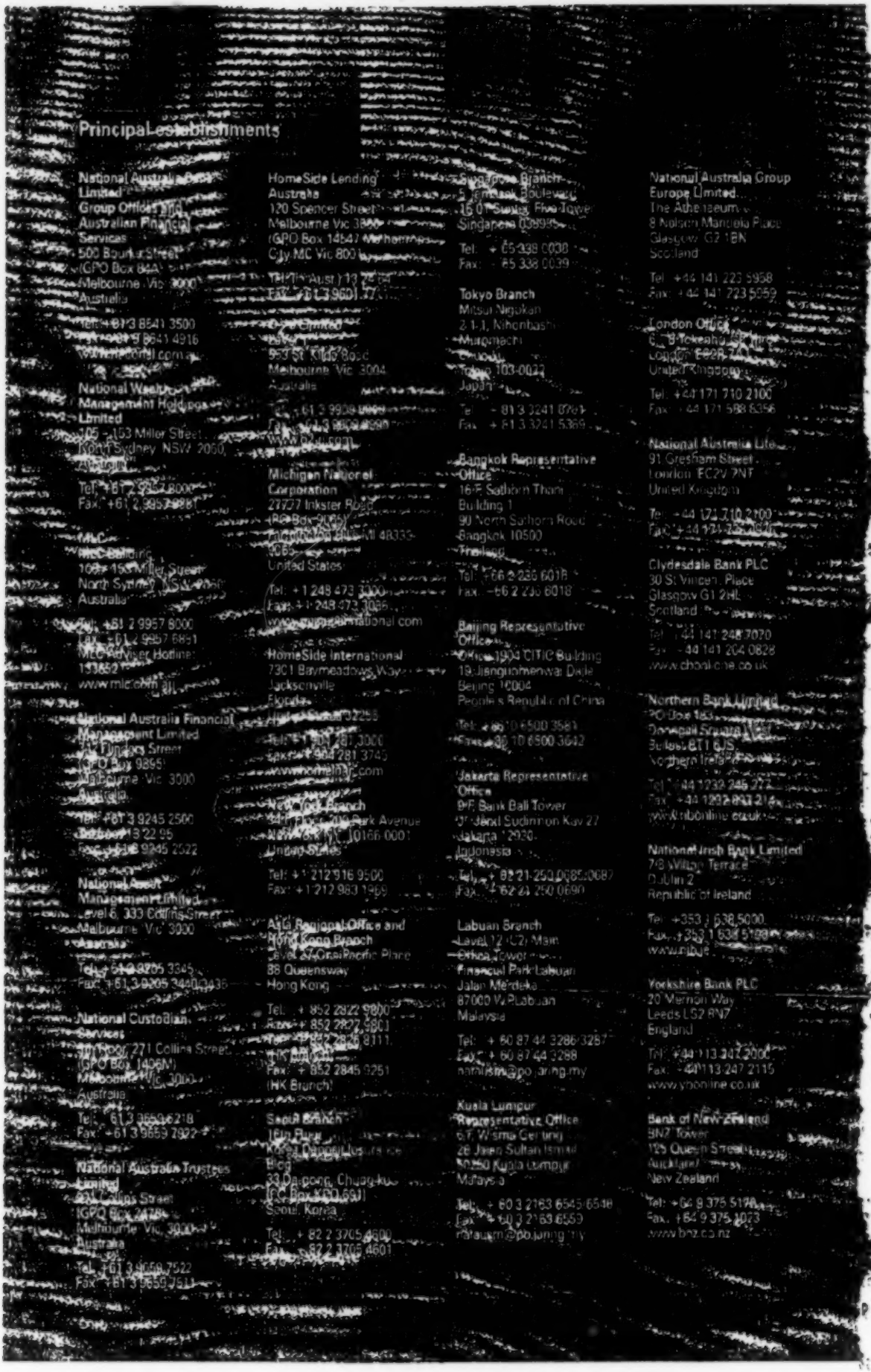
National Income Securities trade on the Australian Stock Exchange under the symbol 'NABHA'

Signatures

The registrant certifies that it meets all of the requirements for filing on Form 20-F and that it has duly caused and authorised the undersigned to sign this annual report to be signed on its behalf.

National Australia Bank Limited
Registrant

Garry F Nolan
Secretary of the Company
Date: November 2, 2000



Principal Establishments

National Australia Bank Limited
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Australian Financial Services
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Fax: +61 3 8641 4916
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MLC Limited
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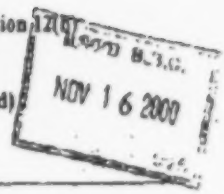
Securities and Exchange Commission
Washington, D.C. 20549

FORM 20-F

(Mark One) | | Registration Statement pursuant to Section 12(b) or (g) of the Securities Exchange Act of 1934

or

[X] Annual Report pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934



For the fiscal year ended September 30, 2000

or

| | Transition Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the transition period from _____ to _____

Commission file number 1-9945

National Australia Bank Limited
(Exact name of Registrant as specified in its charter)

Australia
(Jurisdiction of incorporation or organization)

500 Bourke Street, Melbourne, VICTORIA, 3000 AUSTRALIA
(Address of principal executive offices)

PROCESSED BY
NOV 27 2000
PRIMARK CORPORATION

Securities registered or to be registered pursuant to Section 12(b) of the Act.

Title of each class	Name of each exchange on which registered
Ordinary Shares	New York Stock Exchange
American Depositary Shares, each representing five Ordinary Shares	New York Stock Exchange
Fully paid, Non Cumulative Preference Shares, Liquidation Preference of US$12.50 per share	New York Stock Exchange
American Depositary Shares, each representing two Fully Paid, Non Cumulative Preference Shares, Liquidation Preference of US$12.50 per share	New York Stock Exchange
Exchangeable Capital Units consisting of 7¼% Perpetual Capital Securities and Purchase Contracts	New York Stock Exchange

Securities registered or to be registered pursuant to Section 12(g) of the Act.

None
(Title of Class)

Securities for which there is a reporting obligation pursuant to Section 15(d) of the Act.

None
(Title of Class)

Indicate the number of outstanding shares of each of the issuer's classes of capital or common stock as of the close of the period covered by the Annual Report.

Ordinary Shares	1,514,360,722
Staff Share Scheme Shares	1,749,673 paid to 25 Australian cents
Preference Shares	16,000,000
National Income Securities	20,000,000

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes x No _____

Indicate by check mark which financial statement item the registrant has elected to follow.

Item 17 _____ Item 18 x

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Operating profit after income tax (continued)

For years ended September 30	*2000*	*1999*	*1998*	*1997*	*1996*
Dollars in Millions					
Operating profit before tax, doubtful debt expense, goodwill amortization and abnormal items	5,862	4,928	4,491	3,790	3,532
Goodwill amortization	(197)	(206)	(181)	(142)	(137)
Underlying profit	5,665	4,722	4,310	3,648	3,395
Deduct:					
Charge to provide for doubtful debts	(588)	(581)	(587)	(332)	(333)
Income tax expense	(1,700)	(1,321)	(1,211)	(1,095)	(959)
Operating profit before abnormal items and outside equity interests	3,377	2,820	2,512	2,221	2,103
Add/(Deduct) Abnormal items (after tax)	(136)	-	(497)	-	-
Operating profit after income tax before outside equity interest (per Statement of Profit and Loss)	3,241	2,820	2,015	2,221	2,103
Outside equity interests in operating profit after income tax	2	(1)	1	(2)	1
Operating profit after income tax attributable to members of the Company	3,259	2,821	2,014	2,223	2,102

Operating Profit By Segments

Contributions to Consolidated Operating Profit by Major Operating Segments:

In April 1999, the Group introduced a new business operating model, designed to leverage its global scale while improving its customer focus. This model was refined during 2000. On May 4, 2000 the National announced further changes to its corporate structure. Broadly, the new structure brings together existing growth businesses, high potential global businesses and the various services required to support them. The previous Products and Services division was restructured and four new divisions were created, Wealth Management, Specialist and Emerging Business, National Shared Services and O_2-s. The financial results of O_2-s are currently not disclosed separately but are included within the results below.

For year ended September 30	*2000*
Dollars in Millions	
Operating Segments:	
Business and Personal Financial Services	3,359
Wealth Management	322
Wholesale Financial Services	886
Specialist and Emerging Businesses	310
Homeside	155
National Shared Services	(141)
All Other	(129)
Operating Profit after Tax and Outside Equity Interests	3,259

Comparatives for the corporate reorganization for 1999 and 1998 are not provided as it is impracticable to do so. Refer to Note 3 to the financial statements for further detail on the Group's major operating segments.

During 2000, the Group's operating profit after income tax increased 14.8% to $3,229 million after increasing by 40.1% to $2,821 million in 1999 and decreasing by 1.4% to $2,014 million in 1998. The 1998 result included abnormal charges of $497 million after tax. There were no abnormal items in 1999, and a $136 million abnormal charge in 2000. Excluding the effect of abnormal items, operating profit after tax grew by 19.6% in 2000 from $2,821 million in 1999 to $3,375 million, and by 12.3% in 1999. Excluding the impact of the acquisition of MLC and the adoption of AASB 1028, operating profit after tax and before abnormals increased by 14.5% in 2000 to $3,229 million.

The 2000 result reflects strong growth in lending and the benefits of the Group's income diversification deriving from a broad geographic and business spread, operating efficiency and risk management. The Group's international operations contributed $1,573 million or 49.2% of the profit after tax for 2000. This compares with 1998 when the Group derived only 31.1% of the profit after tax from operations outside Australia.

Operating profit by segments (continued)

Contributions to Consolidated Operating Profit by Major Geographic Areas:

For years ended September 30	*1999*	*1999*	*1999*	*1997*	*1996*
Dollars in Millions					
Australian Group:					
Australia	1,778	1,405	1,331	1,329	1,448
Less: Goodwill amortisation	(3)	(11)	(6)	-	-
Abnormal items (after tax)	(131)	-	(253)	-	-
Total Australian Group	1,646	1,394	1,092	1,329	1,448
European Group:					
Clydesdale Bank	333	262	236	211	162
Northern Bank	163	171	169	119	97
Yorkshire Bank	375	343	344	227	159
National Irish Bank	11	31	33	33	27
National Australia Life	3	10	5	3	(9)
Other [1]	(77)	6	(62)	(45)	(33)
Less: Goodwill amortisation	(62)	(62)	(62)	(62)	(62)
Abnormal items (after tax)	(1)	-	(236)	-	-
Total European Group	894	761	477	488	341
New Zealand Group:					
Bank of New Zealand	315	298	280	277	241
NAE(NZ)	(30)	(27)	(42)	(49)	(49)
Less: Goodwill amortisation	(31)	(31)	(31)	(31)	(31)
Abnormal items (after tax)	-	-	(18)	-	-
Total New Zealand Group	254	240	189	197	161
United States Group:					
Michigan National Corporation	251	254	226	222	138
Homeside	142	153	84	-	-
Other [2]	161	78	(7)	8	17
Less: Goodwill amortisation	(103)	(102)	(82)	(49)	(44)
Abnormal items (after tax)	-	-	13	-	-
Total United States Group	490	383	234	181	131
Asian Group					
Asian Branches	39	33	13	18	13
Other [3]	19	10	12	10	8
Less: Abnormal items (after tax)	(4)	-	(3)	-	-
Total Asian Group	45	43	22	28	21
Operating Profit after Tax and Outside Equity Interests	2,239	2,821	2,014	2,223	2,102

[1] *Europe Other includes National Australia Group (Europe) Limited, London Branch, NAB Investments Limited and NAB Finance (Ireland) Limited.*
[2] *US Other includes New York Branch, National Australia Funding (Delaware) Inc., National Australia Investments, Inc. and Homeside Investment, Inc.*
[3] *Asia Other includes Wealthy Interests Pvt Limited.*

Operating Profit by Major Geographic Areas

Australian Group

The Australian Group includes Personal Banking, Business Banking, Wholesale Banking, National Australia Financial Management, MLC Group, National Asset Management, the Australian Property Companies, Custom Service Leasing, National Australia Trustees, Global Securities Services and County Investment Management and National Australia Investment Capital, corporate centre costs and National Equities.

Australia produced a strong result with operating profit after tax (before goodwill amortisation and abnormal items) increasing by $373 million or 26.5% to $1,778 million in 2000 from $1,405 million in 1999 and $1,351 million in 1998. The cost income ratio increased during the period from 53.5% to 56.0%, primarily due to the inclusion of MLC for the fourth quarter. Adjusting for the impact of the MLC acquisition, the opportunity cost of capital used to fund the acquisition and debt funding costs, and the gross up of income and expenses as a result of the adoption of AASB 1038 "Life Insurance Business", the cost to income ratio declined from 53.5% to 49.7%.

Operating profit by segments (continued)

The inclusion of MLC's results for the three months to September 30, 2000 contributed $105 million before funding costs, including $53 million from revaluation of the investment in MLC and its subsidiary and $54 million from margin on services profits.

Net interest income increased by $743 million or 8.5% in 2000 due to strong lending growth and effective margin management.

The introduction of AASB 1038 impacted revenue, expense and tax disclosure in the 2000 year. The standard requires revenue, expenses and tax to be separately disclosed; these amounts were reported on a net basis in other operating income in previous periods. As a result of the new accounting standard, revenue and expenses and tax before MLC increased by $546 million, $310 million and $76 million respectively for the September 2000 year. The net adjustment had no impact on profit.

After adjusting for AASB 1038, the revaluation of the investments in life insurance entities and the inclusion of MLC's results for three months, other operating income showed strong growth increasing by 7.4% due to volume related growth in credit card fee income, higher fee income from strong growth in lending.

Excluding the impact of AASB 1038 and MLC, other operating expenses grew 2.1% during 2000. Contributing to the increase were market related increases in personnel costs, higher communication costs reflecting channel management strategy and fees and commissions which reflected higher card and electronic transaction volumes.

The charge for doubtful debts increased 15% from $180 million in 1999 to $207 million in 2000 due to volume related growth and a change in asset mix partly offset by lower specific provisioning. Strong credit quality was maintained with gross non accrual loans as a percentage of total loans and advances reducing from 0.75% in 1999 to 0.61%.

Tax expense for the September 2000 year was impacted by $47 million due to the revaluation of new future income tax benefits to reflect the lower Australian tax rates that will apply for future years and $76 million due to the gross up from the adoption of AASB 1038.

European Group

The European banks are now being managed as two regions. The Great Britain region includes Clydesdale and Yorkshire Banks and the Irish region comprises Northern and National Irish Banks.

Common management and processes are being progressively adopted in each region and the individual regional results need to be viewed in total to understand underlying regional performance. A project has been commenced to consolidate the legal entity structures of the two Great Britain banks and the two Irish banks to reflect the new management structure.

Great Britain

Great Britain's profit after tax (before goodwill amortisation and abnormal items) grew 11.6% in the year to $693 million. The result was due to strong lending growth and volume related growth in other operating income.

Clydesdale Bank's profit after tax (before goodwill amortisation and abnormal items) increased by 27.1% to $333 million in 2000 from $262 million in 1999 and $246 million in 1998. The improvement in the Clydesdale result was attributable to higher net interest income, reflecting increased lending volumes and a small improvement in margin, volume related increases in lending fees and brokerage/commissions, and a lower doubtful debts charge. Expenses increased 6.9% (6.0% in local currency) due to sale and leaseback activities and from a change in the methodology used for the recognition of credit card non lending losses.

Yorkshire Bank's profit after tax (before goodwill amortisation and abnormal items) was $375 million, an increase of 9.3% compared with 1999 of $343 million and $344 million in 1998. Underlying profit of $676 million grew by 12.5%. Contributing to Yorkshire's result was higher net interest income due to lending volume increases partly offset by the impact of competitive pressures and product mix on customer lending margins. Volume related increases in lending fees and brokerage/commissions, drove a 4.2% increase in non interest income while lower operating expenses were due to a write down in the residual value of leased vehicles in the prior year.

Ireland

The combined result for the two banks in Ireland represented a reduction in profit of 13.9% mainly impacted by a reduction in net interest margin and higher expenses, including the investigation costs in National Irish Bank and provision for the Deposit Interest Retention Tax settlement of $11 million.

Northern Bank's profit after tax (before goodwill amortisation and abnormal items) decreased by $5 million or 4.7% (4.5% in local currency terms) to $163 million from $171 million in 1999 and $180 million in 1998. This outcome was principally due to a 9.1% (8.3% in local currency) increase in operating expenses. This was driven by an increase in charges for support activities from the NAB Europe operation with a greater proportion of the European Group's costs now being consolidated directly into the results of Northern Bank. Occupancy costs also showed an increase reflecting the impact of the prior year's sale and leaseback of properties, with the sale proceeds being recorded in the previous year's results.

Bad and doubtful debts charge increased $3 million due to one large provision in the September quarter. Net interest income was in line with the previous year. While in local currency terms gross loans and advances increased by 21.4%, this was offset by a contraction in net interest margin by 12 basis points to 3.94%. Other operating income grew by 7.2% (6.2% in local currency) resulting from improved life insurance commission income, an increase in treasury income driven by new products and increases in application and service fees.

National Irish Bank's profit after tax (before goodwill amortisation and abnormal items) reduced from $31 million in 1999 to $16 million for the current year and $33 million in 1998. Net interest income declined by 8.5% (no change in local currency terms) reflecting the entry of new competitors in the Irish market place which has had a significant impact on mortgage margins, offset by growth in fixed rate and term lending.

Expenses increased by 7.1% mainly reflecting on-going investment costs, while other operating income was lower by 9.6% (4.2% in local currency) principally due to profits on disposal of properties in the prior year.

New Zealand Group

The New Zealand Group contributed a profit after tax (before goodwill amortisation and abnormal items) of $285 million compared to $271 million in 1999, an increase of 5.2%, and $238 million in 1998.

Bank of New Zealand (BNZ), including its offshore operations, contributed a profit after tax (before goodwill amortisation and abnormal items) of $313 million in 2000 compared to $302 million in 1999, an increase of 3.7%. (3.1% in local currency), and $280 million in 1998.

Net interest income increased by 2.0% (7.7% in local currency terms) during the 2000 year to $569 million from $493 million in 1999 due to an improved net interest margin and growth in lending.

Other operating income rose by $57 million or 14.9% to $385 million from $335 million in 1999 and $309 million in 1998, due to growth in treasury related trading income, origination fees from project and structured finance transactions, and higher insurance and credit card fee income. Higher credit card fee income reflects the introduction of new products and loyalty programs.

Other operating expenses increased 3.4% from $476 million in 1999 to $493 million in 2000 and $506 million in 1998 reflecting higher volume related operating expenses and a non lending loss recovery recorded in the previous year.

United States Group

The United States Group contributed a profit after tax (before goodwill amortisation and abnormal items) of $333 million compared to $483 million in 1999, an increase of 66.1%, and $305 million in 1998. Excluding the impact of exchange rate movements, profit for the United States Group increased by 17.1%.

MNC contributed a profit after tax (before goodwill amortisation and abnormal items) of $291 million in 2000, an increase of 14.6% (9.2% in local currency) from $254 million in 1999 and $226 million in 1998. Contributing to the increase in profit was an increase in other operating income of 10.9% (5.1% in local currency terms). In local currency terms, net interest income decreased by 1.3% due to tightening lending margins, which were partly offset by higher volumes. Other operating expenses have increased 2.8% in local currency terms due to lower corporate costs and lower bureau charges. MNC's cost to income ratio improved from 53.3% in 1999 to 51.5% in 2000 due to income growth and cost containment.

Homeside US, contributed a profit after tax (before goodwill amortisation and abnormal items) of $141 million compared to $133 million in 1999 and $34 million in 1998. Excluding the impact of exchange rate movements, Homeside's profit decreased by 12.2%. Net servicing revenue was significantly higher than the prior year (53.8% in local currency terms) due to an 18% increase in the average servicing portfolio, lower average servicing costs and a lower amortisation rate, reflecting the impact of higher mortgage interest rates on prepayment activity. Mortgage origination revenue decreased by 55.6% in local currency terms, as a result of diminished refinance activity. In addition, pricing competition and extreme rate volatility in the market caused a decrease in margins.

Homeside also experienced a significant decrease in net interest income largely due to lower mortgage production volumes, resulting from rising interest rates in the US, which impacted the level of mortgage loans held for resale. Excluding exchange rate effects, operating expenses decreased by 12.2% as a result of cost containment initiatives in respect to lower production volumes and a decrease in the servicing cost per loan.

HAB New York also contributed to the United States profit with an increase in profit after tax (before goodwill amortisation and abnormal items) of 110.9% from $66 million to $141 million. The increase in profit was due to a large increase in net interest income of 156.7% attributable to National Income Securities Funding which was raised in August 1999.

Asian Group

The contribution from Asian operations increased from $41 million (before abnormals) for 1999 and $25 million in 1998, to $49 million in 2000. The Asian region continues to experience improved confidence which was reflected in the improvement in the quality of the business written and lower provision for doubtful debts which contributed to the strong profit growth.

Risk management

Risk Management

Management of risk is fundamental to the business of being a full financial services provider and is an essential element of the Consolidated Entity's strategy. Financial Services organisations face an array of risks and increasingly the success or otherwise of the institution relies upon its proactive rather than reactive management of risk.

An enterprise-wide risk management model structure implemented throughout the Consolidated Entity comprises a common policy framework and set of controls to achieve standardisation of risk/reward practices across the Consolidated Entity. Each business unit is responsible, using best practice methodology, for the identification and quantification of the particular risks it is exposed to and for implementation of appropriate policies and procedures.

Overview and monitoring of this process throughout the Consolidated Entity is undertaken by the globally focussed divisions of Risk Management. Risk Management comprises Credit Bureau, Internal Audit, Operational Risk, Insurance and Compliance, Market Risk and Prudential Control, Property Finance & Investment and Group Legal.

Risk Management's role is to constantly monitor and systematically assess the Consolidated Entity's risk profile in existing and future business operations, and to assist business units in the design and implementation of appropriate risk management policies and strategies. Risk Management also promotes awareness of the need to manage risk and the achievement of a balance between risk minimisation and reward for risks accepted.

Developments are being made in the quantification of risks, and the allocation of appropriate risk capital. Portfolio Management methods are being adopted to manage the Group's risk profile. The use of modelling to forecast future risk management trends is being used increasingly to assist in decision making.

Periodically, Risk Management prepares and submits to the Principal Board the "Group Risk Profile". This document profiles the major recognised balance sheet, off balance sheet strategy/performance and operational risks together with procedures for their day to day management, control and responsibility.

A Group Risk Policy Committee, comprising executive and senior management, is the principal risk policy decision making body within the Consolidated Entity. A Risk Policy Committee also exists in each region. These Risk Policy Committees operate under criteria detailed in a "Risk Management Template".

Major balance sheet risk areas and their management are outlined below, but many other types of risks such as environmental, payment systems, computer systems fraud, legislative compliance, business continuity/disaster recovery, and e-commerce, are routinely managed throughout the Consolidated Entity.

Certain sections of the Annual Financial Report 2000 contain forward looking statements. These statements are subject to assumptions, risks and uncertainties, as discussed in this section and referred to elsewhere in the report. Actual results could differ materially from the forward looking statements.

Market Risk

This recognises the potential change in value of assets and liabilities as a result of movement in interest rates, foreign exchange rates, asset prices, option volatility and the level of concentration in any or all of the financial markets in which the National operates.

Trading Risk

Member banks of the Consolidated Entity have a value at risk limit approved by the Principal Board to cover trading activities.

Overview of trading risk is performed by the Market Risk & Prudential Control Department of Risk Management Division. The risk control function is fully segregated from Wholesale Financial Services (WFS) Division. This is to ensure its independence meets both internal and external requirements. A comprehensive global market risk control framework is in operation, and it comprises five regional market risk teams supported by a team located in Head Office.

Limits for the management of trading risk assumed in the normal course of business are delegated to regional or global management in accordance with the organisational structure of WFS. These limits take into account the capacity of regional and global management to manage trading risks and the relative sophistication and liquidity of each market.

Refer to Note 42 to the financial statements, 'Derivative Financial Instruments' for a profile of the Consolidated Entity's derivatives credit risk exposures and further information on risk management.

Balance Sheet Risk

The Group Asset and Liability Management Committee (Group ALCO), under delegated Board authority, sets policies in relation to the management of structural balance sheet exposures. These exposures include structural interest rate risk, structural foreign exchange risk and liquidity risk. The Consolidated Entity's global structural balance sheet risk is monitored against approved policies by Group Balance Sheet Management and reported on a monthly basis to the Group ALCO.

Each geographical region in the Consolidated Entity has an Asset and Liability Committee (ALCO) which is delegated the responsibility for managing local structural balance sheet risks in accordance with Group balance sheet management policies. Group ALCO supervises the management of these local structural risks and monitors activity for compliance with Group policies.

Structural Interest Rate Risk

In carrying out its business activities, each member bank in the Consolidated Entity strives to meet customer demands for products with various interest rate structures and maturities. Sensitivity to interest rate movements arises from mismatches in the repricing dates, cash flows and other characteristics of assets and liabilities. As interest rates and yield curves change over time, the size and nature of these mismatches may result in a loss or gain in earnings.

In managing structural interest rate risks, the primary objective is to limit the extent to which net interest income could be impacted by an adverse movement in interest rates. Each Regional ALCO is responsible for managing the structural interest rate risk within the region, in accordance with approved group policy.

Structural interest rate risk is calculated using balance sheet simulation processes which are undertaken across the National's banking operations. The balance sheet simulation process is based on planned product volumes and margins, which are regularly updated to reflect the Group's latest views on business projections and interest rate environments.

The results of balance sheet simulations, together with other balance sheet risk management information and strategies, are presented and reviewed by regional ALCOs, Group ALCO and the Principal Board on a monthly basis.

The table below presents a summary of the non-consolidated structural earnings at risk relating to non-trading assets and liabilities that are sensitive to changes in interest rates. Based on the structural interest rate risk position at balance date, the table shows the possible impact on income, for the 12 months ending September 30, 2001, under a rising or declining interest rate environment.

For member banks, the rising and declining interest rate scenarios are calculated using a 99% confidence interval around the market implied yield curve. For example, the effect on net interest income from rising interest rates over the coming year is calculated by assuming that interest rates will rise to a level which is exceeded only 3 times out of 100 years (based on the historical behaviour of rates).

The interest rate scenarios for the non-banking entities are based on a sudden and sustained 50 basis point increase or decrease in market interest rates over twelve months.

The impact of interest rate movements on the net income of life insurance and funds management entities is not incorporated within the table below. However, interest rate movements are one of the factors taken into account when determining the change in net market value of these entities when applying Australian Accounting Standard AASB 1038 "*Life Insurance Business*".

	Percent effect on Net Income 2001[1]		*Percent effect on Net Income 2000[1]*	
Australian Dollars in Millions	*Rising Rates*	*Declining Rates*	*Rising Rates*	*Declining Rates*
Australian dollars	(5)	14	39	(43)
Non-Australian dollars	(45)	27	(16)	(13)

[1] *Represents forecast effect as at September 30, 2000 and 1999 respectively for the forthcoming 12 months.*

The exposure expressed in non-Australian dollars is a net exposure of offshore banking and non-banking entities. Structural interest rate exposures in some currencies may be biased towards rising interest rates, whilst others may be biased to falling interest rates.

Commencing October 1, 2000, the National began using a wider range of interest rate scenarios in measuring structural interest rate risk. This will provide the ability to derive a statistical distribution of potential movements in net income. The confidence interval is being increased to 99%, to capture a wider range of potential outcomes.

The non-banking entities do not hold any market risk sensitive instruments for trading purposes.

Interest rate risk relating to trading activities is captured within the Value at Risk framework disclosed separately within the annual report (refer table 2 of Note 42 to the financial statements).

Group Structural Foreign Exchange Risk

Structural foreign exchange risk arises from investments in the Consolidated Entity's foreign branches and subsidiaries. Both earnings and capital are exposed to movements in foreign exchange rates as a result of these investments.

Reported earnings and shareholders' funds are exposed to movements in exchange rates as a result of the need to translate earnings and net assets of the foreign operations into the Australian dollar consolidated accounts. This exposure of reported earnings and capital to movements in exchange rates is sometimes referred to as an accounting or translation exposure which, in the absence of any long term realignment in exchange rates, has no impact on underlying economic exposures.

The policy of the Group is that the net asset position of integrated operations is to be fully hedged, whilst the net asset position and profit and loss of offshore subsidiaries and self sustaining operations is to remain unhedged. The rationale for this approach is that the Group bases its hedging decisions on economic considerations and not on the potential impact which short term currency fluctuations may have on reported earnings and net worth.

Real foreign exchange exposures, on the other hand, arise independent to the accounting process. Such exposures arise from the risk that future cash flows will be converted to Australian dollars at less favourable rates than at present. Such cash flows could result from the repatriation of profits or capital back to the parent entity. Hedging of these exposures is assessed on a case-by-case basis.

Liquidity Risk

Liquidity risk is the risk that the bank is unable to service its cash flow obligations today or in the future. Liquidity within the Group is managed in accordance with policies approved by the Board of Directors, with oversight from both Regional and Group ALCOs.

Throughout the year, the Group managed liquidity risk by a combination of positive cash flow management, the maintenance of portfolios of high quality liquid assets and diversification of its funding base. Liquidity standards approved by Group ALCO ensure that sufficient liquid assets are held to meet prudential and regulatory liquidity requirements. In September 2000, the National moved to a liquidity risk measurement system based entirely on cash flow scenarios. As a consequence, the National was released by its prime regulator, APRA, from the need to maintain a fixed percentage of deposit liabilities in the form of high quality liquid assets (the "prime asset ratio").

Liquidity is managed on a regional basis, with day to day responsibility resting with member banks, offshore branches and regional treasury operating divisions.

Operational Risk

Operational risk is the potential risk of financial loss arising from the performance of operational business processes and activities.

To enhance the Consolidated Entity's ability to identify, measure and manage operational risks, a systematic framework and methodology for operational risk management has been developed and implemented in each regional bank. Operational Risk, Insurance and Compliance is responsible for the oversight of action plans to mitigate high risks, and administration of the methodology and process disciplines, including maintenance of a Group Risk profile to ensure changes occurring within the organisation and industry are reviewed in a timely manner. Documented action plans are in place to control the Group's most significant operational risks and reported to Executive Management and Principal Board on a regular basis for their information and approval.

Credit Risk

Credit Risk is the potential risk of financial loss resulting from the failure of a customer or counterparty to settle their financial and contractual obligations to the Group, as and when they fall due.

The National's Credit Risk infrastructure is framed to provide sound management principles and practices.

Establishing an appropriate credit risk environment

All major credit policies, including portfolio concentration limits, are authorised by the Principal Board. These policies are then delegated to and disseminated under the guidance and control of executive management.

The National's credit policies are documented in a Credit Policy Manual which is applicable to all Group Entities. This Manual provides a consistent view of all major credit policies supporting the credit operations of the Group. The Manual is currently undergoing an extensive review to segregate the credit policies as they apply to each of the customer focused segments of the National Business Model to improve its effectiveness as a support base.

For complex credit products and services, Credit Bureau provides product profiles which define risks, their quantification, reporting methodologies and mitigation.

Portfolio concentration limits are in place across the Group for exposures to certain industry types. Portfolio exposures are reported to the Principal Board half-yearly.

Credit risk inherent in new products and services is managed via infrastructure which includes Risk Management Templates requiring approval by all impacted areas, product profiles defining risks and mitigants, and approval from Risk Policy Committees prior to implementation.

Operating under a sound credit granting process.

The National's strong credit culture embraces the consistent use and focus of sound credit granting criteria including: aggregation of all linked exposures, use of financial covenants, focus on repayment capacity and integrity of the borrower, use of collateral and consideration of economic and industry conditions.

Two important developments in the credit granting process occurred in 2000. Credit Bureau will implement new financial analysis software in all Member Banks. The new software provides for common templates across the Group for credit applications for Wholesale Financial Services and Business Financial Services, and drives analysis and commentary on all of the critical credit assessment factors.

The National's Risk Rating System has been the hub of credit assessment and related processes for the past 10 years. A new Customer Rating System based on probability of default has been developed which provides a much greater granularity than the present system and matches more closely the rating systems of supervisory bodies and external agencies. This System will more objectively define individual credit risks and portfolio profitabilities, and will provide greater focus in pricing for risk.

A system of overview of lending approvals by a higher level of authority is fundamental to the Group's lending culture and philosophy.

Policy and practice has been in place within the Group for many years and it provides that overall credit limits are established at the level of individual borrowers and counterparties, and groups of connected counterparties that aggregate in a comparable and meaningful manner different types of exposures, both on and off the balance sheet. Credit policy sets out the factors requiring aggregation of exposure and final determination of which exposures are aggregated for with the approving authority. Delegated Commitment Authorities are measured against the total aggregated exposure of the applicant group.

There is a clearly established process for approving new credits and the extension of existing credits and all extensions of credit are assessed on a non-arm's length basis.

A structure comprising centralised, independent Credit Bureaux staffed with appropriately skilled resources to service particular customer focused segments eg. Wholesale Financial Services and Business Financial Services, ensures compliance with credit policy and process. Extension of credit in related entities within the Group is subjected to the same independent assessment and monitoring processes.

For Retail Financial Services, scoring solutions are implemented via robust packaged operational software, supported by the mandatory use of appropriate monitoring tools. These monitoring tools coupled with dedicated regional Decision Tools Units, provide the essential continual review of data integrity, scorecard performance and decision strategies. Software to validate and verify input data is used globally to support data integrity and prevent fraudulent activity.

Maintaining an appropriate credit administration, measurement and monitoring process

Efficient and effective credit administration operations and adequate control over "back office" procedures such as monitoring documentation, contractual requirements, legal covenants, collateral etc, are recognised as being vitally important aspects of the whole credit function.

At the National these responsibilities are assigned to various business units, eg. Cards, Leasing & Asset Finance, and centralised structures supporting the branch network, eg. Personal Credit Offices, Business Servicing Units and others. These units are all subject to quality controls and periodic audit.

Monitoring the condition of individual credits principally rests with Relationship Managers, with overview by supervising authorities where systems detect irregularities.

Over the next twelve months Data Warehouses will be created at Regional level which will provide the National with the ability to monitor credit portfolios independently of Relationship Management by identifying borrowers for whom current financial statements are not held, identifying borrowers not observing financial covenants, stress testing to identify borrowers exhibiting adverse trends in financial performance, and development of early warning systems.

Information systems and analytical techniques that enable management to measure credit risk inherent in all on and off balance sheet activities are under continuous development. During the past 12 months an updated system to provide a more accurate view of credit exposures for all balance sheet items has been implemented Group wide. Credit Bureau has defined data needed to manage credit risk and data quality at both individual credit and portfolio levels and this data is populated into Risk Data Marts within Data Warehouses.

Systems for monitoring overall composition and quality of the credit portfolio are in place and work is proceeding to identify risk correlations within the National's portfolios which may create concentrations.

Ensuring adequate controls over credit risk

Periodic audits, Risk Asset Reviews and one-off Credit Reviews all provide an overview of credit risk.

There is a formal Risk Asset Review process with units in place in each Region across the Group. Detailed quarterly reports are submitted to executive management and the Principal Board Audit Committee. Additionally the National is formalising the concept of regular Credit Reviews targeted at specific elements of credit portfolios.

Samples of individual credit approvals are overviewed by higher levels of authority. All asset accounting systems are programmed to report exceeds of approved limits or debts without limits to higher levels of authority.

Credit policy sets minimum approval levels for violation of credit policy and standard audit practices monitor compliance.

Formal large exposure reporting is provided quarterly to the Principal Board and to relevant Regulatory Authorities.

The Asset Structuring functional stream, reporting to Credit Bureau, has proven highly effective in remediating stressed credits and exiting severely impaired credits with minimal losses. The National is considered to employ industry best practice in this regard, with the use of skilled external resources on secondment and upskilling of internal staff being a feature of this function.

The role of supervisors

The Group provides quarterly information to the Australian Prudential Regulation Authority (APRA), on a no-names basis, of exposures to individual customers or groups of related customers in excess of 10% of Tier 1 and Tier 2 capital. Notification to APRA is required in advance before approving any exceptionally large exposures.

Country Risk

Sound international lending practices require not only commercial credit analysis of the borrower of the type normally associated with domestic lending, but also an assessment of country risk. Country risk arises from economic, financial, political or social factors within a country which may affect a borrower's ability to repay loans made by the Consolidated Entity. This consideration is applied notwithstanding the fact that the borrower's own credit standing domestically might not have been impaired.

The Group has an established process for assessing country risk which is used in setting and monitoring its cross-border exposures. Each country is graded from AAA (least risky) to D (most risky). Grading depends upon the analysis of various economic indicators and the assessment of social and political factors. On the basis of the country credit grading, together with the relative size of the country, its ability to produce foreign exchange reserves and meet financial obligations, the Consolidated Entity sets prudential cross-border limits for each country which are apportioned to each member of the banking group.

Limits are allocated into maturity time-bands which vary according to the risks of the country concerned and the outlook for the economy/political landscape. Exposures are monitored daily. The Principal Board approves these individual country limits on an annual basis.

Cross-Border Outstandings by Industry Category

The following table analyses the aggregate cross-border outstandings due from countries other than Australia where such outstandings individually exceed 0.75% of the Consolidated Entity's assets. For the purposes of this presentation, cross-border outstandings are based on the country of domicile of the borrower or guarantor of the ultimate risk, and comprise loans, balances due from banks, acceptances and other monetary assets. Local currency activities with local residents by foreign branches and subsidiaries are excluded.

	Bank and other financial institutions $M	Other commercial and industry $M	$M	% of Group assets	Commitments including irrevocable letters of credit
As at September 30, 1994					
United Kingdom	2,093	1,192	3,285	1.0	3,744
Japan	5,384	125	5,509	0.6	2,887
United States	1,424	1,481	2,905	0.8	6,942
As at September 30, 1995					
United Kingdom	2,648	1,067	3,715	1.0	4,234
Japan	2,154	-	2,154	0.6	1,129
United States	2,434	637	3,071	0.8	7,125
As at September 30, 1996					
United Kingdom	3,188	1,285	4,873	1.0	1,990
Japan	4,397	-	4,397	1.0	566
United States	3,956	1,033	4,991	1.2	7,397

People and Culture

The table below summarises the Consolidated Entity's staffing position as at September:

	1994	1995	1996	1997	1998
Number of Employees full-time and part-time[1]	31,879	31,566	30,973	32,226	32,912
Number of Employees full-time equivalents[2]	47,034	45,676	46,340	46,422	47,778
Operating profit after tax (before abnormal items) per full-time employee	71,757	61,961	55,529[3]	47,918	44,885[4]

[1] *Full-time and part-time staff includes unpaid absence (eg maternity leave). Full-time equivalents include part-time staff (pro rated).*

[2] *Includes the amount relating to MLC from June 30, 1998, the date on which the Consolidated Entity acquired this entity. Calculation has been adjusted to include MLC full-time equivalent staff at September 30, 1998 in proportion to the 93 day period which they contributed to the profit of the Consolidated Entity.*

[3] *Calculation has been adjusted to include Bancoffice full-time equivalent staff at September 30, 1998 in proportion to the 332 day period during which they contributed to the profit of the Consolidated Entity.*

[4] *Calculation has been adjusted to include MPC full-time equivalent staff at September 30, 1998 in proportion to the 332 day period during which they contributed to the profit of the Consolidated Entity.*

PETITIONER'S BRIEF

152 (9)

No. 08-1191

Supreme Court, U.S.
FILED
JAN 19 2010
OFFICE OF THE CLERK

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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether federal courts have subject matter jurisdiction under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, over fraudulent conduct that occurred in the United States "by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . ." *Id.*

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Plaintiffs-Appellants and Petitioners: Russell Leslie Owen and Brian and Geraldine Silverlock, residents of Australia, and Robert Morrison, a resident of the United States.

Defendants-Appellees and Respondents: National Australia Bank ("NAB"); Frank Cicutto, an officer of NAB during the relevant time period; HomeSide Lending, Inc. ("HomeSide"), a Florida-based subsidiary of NAB; and Hugh Harris, Kevin Race and W. Blake Wilson, officers of HomeSide during the relevant time period.

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BRIEF FOR PETITIONERS

Petitioners respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Second Circuit which affirmed the district court's dismissal of the complaint for lack of subject matter jurisdiction.

OPINIONS BELOW

The order of the United States District Court for the Southern District of New York, dated October 25, 2006, can be found at 2006 WL 3844465 (S.D.N.Y. Oct. 25, 2006). PA 23a.[1]

The panel opinion of the United States Court of Appeals for the Second Circuit, dated October 23, 2008, is officially reported at 547 F.3d 167 (2d Cir. 2008). PA 1a.

JURISDICTION

The ruling of the United States Court of Appeals for the Second Circuit sought to be reviewed was issued on October 23, 2008. On January 13, 2009, Justice Ginsburg granted an extension of time until March 23, 2009 in which to file a petition for a writ of certiorari. The petition for a writ of certiorari was filed on March

[1] "PA" refers to the Appendix to the Petition for a Writ of Certiorari, which was filed on March 23, 2009. "JA" refers to the Joint Appendix, which was filed on January 19, 2010. "SA" refers to the Supplemental Appendix, also filed on January 19, 2010, which contains documents that were not legible when reduced to the size of the Joint Appendix.

23, 2009, and granted on November 30, 2009. The Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The primary statutory provision involved is 15 U.S.C. § 78j, which states as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in Section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping

> requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in Section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under Section 77q(a) of this title and Sections 78i, 78o, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

The primary code provision involved is 17 C.F.R. § 240.10b-5, which states as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact

necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

A. Factual Background

Petitioners' central allegations in the courts below concern Respondent HomeSide Lending, Inc. ("HomeSide"), which at one time was the sixth largest mortgage servicer in the United States. HomeSide was located in Jacksonville, Florida and at all relevant times was a wholly-owned subsidiary and agent of Respondent National Australia Bank ("NAB"). HomeSide was a mortgage service provider, meaning it serviced mortgages in return for a fee. Respondents Harris, Race and Wilson served as HomeSide's Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer, respectively, from April 1999 until each man "resigned" on September 4, 2001.

Respondent NAB is organized under the laws of Australia and, at all relevant times, was that country's largest bank. NAB's ordinary shares trade on the Australian securities exchanges, and its American

Depositary Receipts ("ADRs")[2] traded on the New York Stock Exchange ("NYSE"). Respondent Frank Cicutto was Chief Executive Officer of NAB until February 2004.

Petitioners alleged that NAB, HomeSide and the individual defendants – Harris, Race and Wilson, then residents of Florida – violated the federal securities laws by intentionally overvaluing HomeSide's portfolio with the selection of improper mortgage prepayment speeds,[3]

---

[2] "ADRs are investment vehicles for investors to register and earn dividends on non-U.S. stock without direct access to the overseas market itself. U.S.-based depository banks hold the overseas securities in custody in the country of origin and convert all dividends and other payments into U.S. dollars for receipt holders." W. Bailey, G. Andrew Karolyi, and C. Salva, *The Economic Consequences of Increased Disclosure: Evidence from International Cross-Listings* at 8, Ohio State University Publishing (Feb. 4, 2005). ADRs, as with the case at bar, typically move in tandem with the underlying security on its home exchange. Since NAB's ADRs were Level 3 ADRs under Securities Exchange Commission ("SEC") regulations, NAB was required to file with the SEC Forms 6 and 20, which are analogous to Forms 10-Q and 10-K filed with the SEC by United States corporations. It is not disputed that the ADRs were traded on the NYSE although ADR purchasers are not encompassed within the proposed plaintiff class.

[3] The mortgage industry has a standard measure for prepayment speeds, which measures the rate of prepayment of mortgage loans. For example, as interest rates go down, mortgage holders prepay and obtain new mortgages to secure lower rates. The faster the rate of these prepayments the lower the future earnings stream attributable to the underlying original "pool" of mortgages, which in turn was capitalized as an asset known as mortgage servicing rights, which appeared on the consolidated NAB balance sheet. JA 83a-84a.

in violation of Generally Accepted Accounting Principles, which respondents knew were incorrect and which were chosen solely in order to achieve over-inflated earnings targets. This overvaluation occurred in a declining interest rate environment in which customers were refinancing and paying off mortgages – by hundreds of millions of dollars – that were being serviced by HomeSide, and HomeSide's only real asset, its mortgage servicing rights ("MSR"), was disappearing. JA 117a-123a.

This fraudulent financial information was then transmitted to NAB in Australia. NAB incorporated this fraudulent information into its annual reports, reprinting the fraudulent financial information of HomeSide *line-by-line*. For example, in NAB's 1999 Annual Report, NAB listed, as a separate line item, the expenses and income of each of its wholly-owned subsidiaries, including HomeSide:

For years ended September 30 *Dollar in Millions, except percentage*	*1999*	*1998*
* * *		
HomeSide		
Other operating expenses	386	217
Operating income	640	387
%	60.3	56.1

SA 6. This separate line item was repeated in each of NAB's Annual Reports during the relevant time period, and similar financial information was included in the Form 20s filed by NAB with the Securities and Exchange

Commission ("SEC") during the relevant time period. SA-21, 26; SA-60.[4]

The central allegation of Petitioners' claims is that the fraudulent scheme occurred in Florida. HomeSide and the individual defendants engaged in a deceptive act and scheme whose principal purpose and effect was to create a false appearance of financial strength. JA 99a. In addition, every false statement made by NAB concerning HomeSide's operations, results and value was an exact repetition of the false financial information that HomeSide concocted in Florida for the very purpose of misleading NAB's shareholders about HomeSide's value and financial results.[5] JA 5a at A-1455.

When the accounting fraud was disclosed on September 3, 2001, NAB announced two massive

[4] The court below found, *without any support in the record*, that the numbers HomeSide transmitted to NAB "had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." PA 21a. The Solicitor General, in her amicus brief opposing certiorari, unfortunately repeats this unfounded assertion. Brief of the United States As Amicus Curiae 5, 12, 15-16. As set forth in the express allegations of the complaint, NAB ministerially incorporated the fraudulent financial information it received from HomeSide. *See* Point II(B)(2), *infra*.

[5] Only the Consolidated Class Action Complaint, filed on January 30, 2004, appears in the Joint Appendix. Certain relevant facts are set forth in the Amended Consolidated Class Action Complaint, filed on December 26, 2006. Citations to these facts are to the relevant docket entry in the Joint Appendix and the page number of the document.

writedowns totaling well over three billion Australian dollars.[6]

B. NAB Participated In The Fraud At Homeside Through Its Activities In The United States

NAB directly participated in the affairs of HomeSide in the Florida subprime mortgage market. First, NAB, when it acquired HomeSide in February 1998, installed one of its Australian officers, Dave Thompson, at HomeSide. Thompson's position as an NAB Australian officer at HomeSide provided him with full access to and knowledge of the accounting fraud at HomeSide. Thompson had virtually daily contact with NAB as he monitored the business operations at HomeSide, and permitted the fraudulent activity to continue.[7] JA 5a at 1484.

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[6] After the revelation in September 2001 of the Australian $3.05 billion writedown that NAB was forced to book, NAB sold HomeSide to Washington Mutual, Inc., one of the primary participants in the subprime mortgage debacle. In September 2008, J.P. Morgan Chase & Co. purchased the banking assets of Washington Mutual, Inc.; the following day, Washington Mutual, Inc. filed for Chapter 11 voluntary bankruptcy. JA 5a at A-1394.

[7] In addition, NAB reported its MSR assets as a balance sheet line item in its Annual Reports. *See* SA-11; SA-36. The 1999 and 2000 Annual Report clearly disclosed that "[f]ollowing the acquisition of HomeSide in February 1998, [NAB] derives fees from mortgage servicing." SA-4; SA-21. Thus, investors knew that all mortgage servicing income of NAB was derived from HomeSide.

Second, NAB maintained offices on Park Avenue in New York City, SA-57,[8] at which traders, on behalf of HomeSide, engaged in complex financial transactions to hedge the outstanding mortgage exposure and exposure to interest rates that were present in HomeSide's portfolio. In setting up this hedge, NAB and HomeSide were trying to offset any losses in the HomeSide portfolio by a corresponding gain on the other side of the hedge; to be successful, the hedging strategy required that the traders accurately know the portfolio size and income stream from the expected mortgage payments. PA 76a-80a. The hedging activity in New York compounded the damage created by the fraud in Florida and, for example, in 1999 hedging losses totaled a staggering $1.4 billion and in 2000 another $480 million. JA 76a-80a. As a result of the hedging losses sustained by traders in NAB's New York office, NAB announced a writedown of the balance sheet value of HomeSide of $450 million on July 5, 2001, which NAB attributed to a failure of HomeSide's risk management systems. JA 5a at A-1261-64.

Finally, NAB officials received more than simply a warning; in July 2000, *HomeSide employees specifically*

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[8] NAB initially established its retail presence in the United States in 1995 with the purchase of Michigan National Corporation ("MNC"), whose principal subsidiary was Michigan National Bank ("MNB"). MNC was the third largest bank holding company in the State of Michigan and the 68th largest in the United States in terms of total assets as of June 30, 2000. As of September 30, 2000, MNC's total assets were $16 billion and MNB operated 184 outlets and 333 ATMs across the State of Michigan. NAB sold MNC to ABN AMRO in April 2001. PA 5a at 448, 999.

notified NAB that HomeSide was engaged in accounting fraud. In July 2000, several HomeSide employees "blew the whistle" on the fraud that they witnessed taking place at HomeSide's offices in Florida. The employees sent a letter to Cicutto and members of NAB's risk management group in Melbourne. JA 89a. The letter did not simply say that there was an unspecified fraud taking place at HomeSide; rather, the letter detailed the specific processes that individual defendants Harris, Race and Wilson and others were using to manipulate the prepayment and discount rate assumptions HomeSide used to value its MSR, the business's most significant asset. In addition, the whistle-blowing employees directed Cicutto and NAB's risk management team to specific electronic files that contained data which confirmed and documented the fraudulent scheme. Thus, for more than 13 months prior to NAB's disclosure that it would write off A$3.5 billion due to problems at HomeSide, NAB and Cicutto had direct knowledge of the fraud that was used to make NAB's financial situation appear significantly better than it actually was. JA 90a.

C. The District Court Opinion

The foregoing allegations of fraud were all committed in the United States through the instrumentalities of interstate commerce and the United States mails. Nonetheless, the district court, in an Opinion entered on October 26, 2004, dismissed the claims against NAB on the grounds that the district court did not have subject matter jurisdiction over the claims brought by foreign plaintiffs or based on transactions conducted on foreign exchanges. PA 42a. Subject matter jurisdiction

would be limited to securities transactions in the United States, and the district court set out that in order to maintain a claim, Petitioners would have "leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only." PA 45a.

The district court entered final judgment on January 16, 2007.

D. The Second Circuit Decision

A three-judge panel of the Second Circuit heard oral argument on July 18, 2008. The panel invited the SEC to submit an amicus brief on whether the antifraud provisions of the United States securities laws apply to fraud perpetrated in the United States by a foreign company. PA 48a.

According to the SEC:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

PA 48a. Applying this standard to the allegations in Petitioners' complaint, the SEC concluded that "material and substantial conduct in furtherance of the alleged fraud occurred in the United States so as to support application of the antifraud provisions . . . ." PA 49a-50a.

The Second Circuit, without any analysis of the SEC's position, held that there was no subject matter jurisdiction, because "the alleged fraud [did not] affect[ ] American investors or America's capital markets." PA 20a. The court below reasoned that "[t]he actions taken and the actions not taken by NAB in Australia were . . . significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a. This justified dismissal: "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." *Id.* The Second Circuit held that American securities laws only reach harms "perpetrated abroad which have a substantial impact on investors or markets within the United States," notwithstanding where the fraud occurs. PA 7a (quoting *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998)).

According to the Second Circuit, because the effects of the conduct were not realized in the United States, the fraudulent conduct was rendered beyond the reach of American securities laws. The Second Circuit accordingly affirmed the district court in dismissing all claims concerning transactions that did not occur on the American exchanges, while allowing any claims based on transactions in the United States to be asserted separately. PA 23a.

SUMMARY OF THE ARGUMENT

This is a case about statutory construction. In Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "Exchange Act"), Congress declared that

> "[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

15 U.S.C. § 78j(b).

By the express terms of the statute, a federal violation occurs whenever a fraud is committed in connection with the purchase or sale of *any security* under one of the three conditions. The Exchange Act is violated if a person uses any means or instrumentality of interstate commerce ***or*** uses the United States mails ***or*** uses any facility of any national securities exchange to perpetrate a securities fraud. Under ordinary rules of statutory construction, the disjunctive "or" means that any one of the three conditions is a basis for subject matter jurisdiction.[9]

[9] When interpreting a statute, "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United*

(Cont'd)

Here, Petitioners clearly alleged that NAB had engaged in fraudulent conduct in connection with the sale of securities and that this fraud was perpetrated through interstate commerce in this country and through the use of the United States mails. JA 40a. The court below decided to truncate the Exchange Act and ignore two of the three conditions that Congress had made actionable, making actionable only fraudulent conduct that implicated a national securities exchange in the United States. All other claims, according to the court below, would be dismissed for want of subject matter jurisdiction. In unceremonious fashion, the Court of Appeals for the Second Circuit dropped two of the predicate conditions for actionable securities fraud from the statute that Congress had passed and the President had signed.

As is well-established in the Court's case law on subject matter jurisdiction, the lower federal courts are without authority to disclaim the subject matter jurisdiction that Congress has given them. This is the rule that the Court explicitly set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006), and then reiterated unanimously just this Term in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region*, 130 S. Ct. 584, 596 (2009) ("*Union Pacific*").

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States v. Menasche, 348 U.S. 528, 538-39 (1955)). "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Although the court below did not have the benefit of *Union Pacific* at the time of its ruling, the error is unmistakable under that holding or the holding in *Arbaugh*.

ARGUMENT

I. Contrary To The Express Language Of The Exchange Act, And Contrary To The Court's Recent Holdings In *Arbaugh* And *Union Pacific*, The Courts Below Improperly Dismissed The Complaint Solely On The Grounds Of Subject Matter Jurisdiction

A. The Court Should Vacate The Decision Below Because It Is Inconsistent With *Arbaugh* And *Union Pacific* And Remand In Light Of *Union Pacific*

The only issue addressed below was whether there is subject matter jurisdiction over securities fraud that occurs in the United States, but which is then inflicted on foreign investors through an overseas exchange. The facts of record make clear that the connection to the United States was not a matter of happenstance, but was the very essence of the fraud alleged. As summarized by the Second Circuit, "By March of 2000, HomeSide, as a wholly owned subsidiary of NAB, held the rights to service $18 billion of mortgages, making it America's sixth biggest mortgage service company." PA 3a. The fraud alleged involved HomeSide's accounting practices in the United States, *id.*, and that fraud was perpetrated through SEC filings, annual reports of HomeSide, and press releases, PA 4a, all of

which occurred in the United States and all of which involved interstate commerce and the U.S. mails. Nor given the enormity of the subprime mortgage calamity in the American economy is a fraud of this magnitude of no concern to American finance.

Despite the allegations that the fraud was concocted and executed in Florida, the Second Circuit held this conduct to be outside the reach of the federal securities laws. The court below, as well as other courts of appeals that have addressed the issue of the reach of Section 10(b), have consistently framed the issue as one of "subject matter jurisdiction." *See, e.g.*, PA 22a ("we lack subject matter jurisdiction").

This ruling cannot stand. Twice in the past few Terms, the Court has had to instruct lower federal courts that subject matter jurisdiction is a matter of statutory construction and is not a question of the strength of the averments made or the proofs offered in the particular case. In *Arbaugh*, this Court addressed concerns that courts were conflating and confusing subject matter jurisdiction with the need to prove the essential elements of a claim for relief: "We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." 546 U.S. at 511 (quoting *Steel Co. v. Citizens for Better Env't.*, 523 U.S. 83, 91 (1998)).

The Court in *Arbaugh* adopted a "bright line" test to determine whether a statute was jurisdictional or whether the allegations of a particular case were

independently part of the merits of inquiry of the case. The test, the Court in *Arbaugh* explained, is as follows:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (citation and footnote omitted). Therefore, subject matter jurisdiction is governed by the language of the jurisdictional provisions of the statute.

Indeed, as the Court reaffirmed this Term, "[s]ubject-matter jurisdiction properly comprehended . . . refers to a tribunal's 'power to hear a case,' a matter that 'can never be forfeited or waived.'" *Union Pacific*, 130 S. Ct. at 596 (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). In *Union Pacific*, the Court addressed whether "written documentation of the conference in the on-property record is a necessary prerequisite to arbitration" under the Railway Labor Act ("RLA"). *Id.* at 595. The Court's clear holding was again that jurisdiction is defined by the express language of the statute, not by the proof in the particular case: "nothing in the [RLA] elevates to jurisdictional status the obligation to conference minor disputes or to prove conferencing." *Id.* at 595-96.

In *Arbaugh*, the question presented was whether subject matter jurisdiction under Title VII turned on the minimum number of employees requirement. The Court held that the statutory provisions governing jurisdiction over Title VII suits did not contain any employee-numerosity requirement and the numerosity requirement at issue was set forth in a separate provision that did "not speak in jurisdictional terms." *Arbaugh*, 546 U.S. at 514-15. In *Union Pacific*, the statutory grant of authority under the RLA did not contain a subject matter jurisdiction requirement of "conferencing." 130 S. Ct. at 588. In both cases, the Court directed the lower court or agency to proceed with the case because the particular requirement at issue was not jurisdictional.

As set forth below, the Exchange Act does not contain a statutory limitation that would limit the reach of the Act only to frauds that have an effect on American purchasers or American exchanges. Accordingly, since the statutes do not rank effects in the United States as jurisdictional, this Court "should treat the restriction as nonjurisdictional in character," *Arbaugh*, 546 U.S. at 515, and reverse and remand the suit for further proceedings.

The Second Circuit's holding diminishes the effectiveness of the Exchange Act. As the SEC argued below, and as advanced by the Solicitor General in her opposition to the writ of certiorari, the jurisdictional ruling would not only result in the dismissal of the present action, but would divest the SEC of critical enforcement powers under the very same statute. Based on its experience in overseeing securities markets that

increasingly engage in global transactions, the SEC proposed the following test to the court below:

> The antifraud provisions of the securities laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.

PA 48a. As previously noted, the SEC took the position that Petitioners' complaint satisfied this standard. PA 49a-50a.

The Solicitor General refined this test and also concluded that Respondents' actions as alleged in the Complaint also satisfied the subject matter jurisdiction test advanced by the government.

> [I]t is sufficient if the scheme involves significant conduct within the United States that is material to the fraud's success. The allegations in petitioners' complaint satisfy that standard. According to those allegations, the false information that was released to the public in Australia was generated in the United States with the expectation that it would be incorporated into NAB's financial statements. The conduct of HomeSide and its officers within the United States thus was not peripheral or merely preparatory, but was an integral component of the overall

> scheme . . . . To the extent the court of appeals concluded that the scheme as alleged did not violate Section 10(b), its analysis is incorrect.

Brief For The United States As Amicus Curiae 13.

B. The SEC's "Materiality" And "Substantiality" Test Is Proper Under The Exchange Act

Jurisdiction over claims alleging violations of the Exchange Act is established by 15 U.S.C. § 78aa. That statutory provision provides that the district courts "shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of ***all*** suits in equity and actions at law brought to enforce ***any*** liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa (emphasis added).

Congress could have made the geography of the fraudulent scheme "jurisdictional," just as it had made an amount-in-controversy threshold an ingredient of subject matter jurisdiction under 28 U.S.C. § 1331 prior to 1980. Neither the Exchange Act's jurisdictional provision, 15 U.S.C. § 78aa (authorizing jurisdiction over suits "to enforce" the Act) nor, for that matter, 28 U.S.C. § 1331, specifies any threshold amount of harm in the U.S. as a jurisdictional ingredient akin to the monetary floor provision that was part of § 1331 prior to 1980.

Indeed, the relevant section of the Exchange Act, 15 U.S.C. § 78j, does not focus on the geography of the fraudulent scheme at all. It is irrelevant under the plain language of the Exchange Act whether the fraudulent

scheme was conceived and executed in whole or in part outside the United States. Rather, the plain language of the statute makes actionable the manner in which conduct is perpetrated, not the point of sale of the securities in question. The statute and the implementing regulation make it unlawful,

> "by the use of any means or instrumentality of interstate commerce ***or*** of the mails, ***or*** of any facility of any national securities exchange . . . [t]o engage *in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,* in connection with the purchase or sale of any security."

17 C.F.R. § 240.10b-5 (emphasis added)

The Second Circuit rejected the statutory test for one of its own crafting. Relying on its own case law, the court below wrote, "we look to whether the harm was perpetrated here or abroad *and* whether it affected domestic markets and investors." PA 8a. Certainly Congress could have created, had it so wished, a domestic fraud statute that would open a "Barbary Coast" safe harbor for fraud that occurred here but led to injury abroad. *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977). No such jurisdictional safe harbor is present in the Exchange Act. Yet, this is what the Second Circuit created, thereby allowing an unregulated launching point for fraud generated in the United States, so long as the ultimate transaction was elsewhere. Thus, for the Second Circuit the dispositive fact was that the fraudulent scheme "culminated abroad," PA 9a, a jurisdictional line that finds no support in the statutory language.

In applying the bright-line test of *Arbaugh* to this case, the extent to which the harms were felt in the United States or Australia "is an element of a plaintiff's claim for relief, not a jurisdictional issue." *Arbaugh*, 546 U.S. at 516. By contrast, jurisdiction turns on whether the fraudulent scheme relied upon the instrumentalities of interstate commerce or the U.S. mails. The SEC, in its amicus brief submitted to the court below, opined that Petitioners' allegations of a massive accounting fraud perpetrated by HomeSide in Florida stated a claim under the federal securities laws. *See* PA 77a ("the Commission believes that the allegations in this case satisfy the proposed standard governing subject matter jurisdiction set forth by the SEC") (emphasis added). As emphasized again in *Union Pacific*, lower courts are not free to jettison those parts of subject matter jurisdiction not to their liking. Subject matter jurisdiction can only be created – or limited – by Congress.

II. Petitioners Have Properly Asserted Subject Matter Jurisdiction In This Case

A. By Its Terms, The Exchange Act May Apply To Foreign Commerce

Petitioners, in their complaint, set forth three theories for defendants' liability under Section 10(b) of the Exchange Act: (1) a scheme "designed to defraud by representations," *Pasquantino v. United States*, 544 U.S. 349, 357 (2005) (quoting *Durland v. United States*, 161 U.S. 306, 313 (1896)); (2) scheme liability under Section 10(b); and/or (3) a misrepresenta-tion claim under Section 10(b). Although the court below only

looked at item (3), all of these theories are actionable under the Exchange Act for unlawful conduct in the United States, based on interstate commerce or the mails. The claims set forth are based on the exercise of legislative power to proscribe certain conduct that occurs within the territory of the United States, which Congress did in Section 10(b).

The expansive reach of Section 10(b) to all fraud-related activity undertaken in the territorial United States is not accidental. Beginning with the preamble to the Exchange Act, the statutory purpose is clearly to reach beyond conduct affecting only Americans or the American exchanges: "To provide for the regulation of securities exchanges . . . operating in interstate and *foreign commerce* and through the mails, to prevent inequitable and unfair practices on such exchanges . . . ." 48 Stat. 881 (1934) (emphasis added).

As to the scope of the conduct proscribed, Section 10 of the Act, 15 U.S.C. § 78j, prohibits "any person" from employing, even indirectly, "any means or instrumentality of interstate commerce" in contravention of rules against manipulative and deceptive devices proscribed by the SEC. "Interstate commerce" is defined by the Exchange Act to include "trade, commerce, transportation, or communication . . . between *any foreign country and any state* . . . ." 15 U.S.C. § 78c(a)(17) (emphasis added).[10]

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[10] Moreover, although the Court need not reach the question, Petitioners here have alleged a violation of Section 10(b) and Rule 10b-5. Rule 10b-5(a) makes it unlawful for "any

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The allegations of securities fraud in this suit, which are based on HomeSide documents disclosed by "whistleblowers" who were employed by HomeSide, arise from the calculation of HomeSide's mortgage servicing rights ("MSR") flowing from its conduct in the Florida subprime mortgage market. This overvaluation scheme was conceived and implemented by defendants in the United States; the fraudulent overvaluations were generated in the United States; and defendants then transmitted this fraudulent information to Australia for incorporation into NAB's financial statements. NAB incorporated this fraudulent information into its annual reports, reprinting the fraudulent financial statements of HomeSide *line-by-line*. As set out in the complaint, every false statement made by NAB concerning HomeSide's operations, results and value was a repetition of the false financial information that HomeSide fabricated in Florida for the very purpose of misleading NAB's shareholders about HomeSide's value and financial results. JA 5a at A-1455.

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person," "directly or indirectly," to "employ any device, scheme, or artifice to defraud." 17 C.F.R. 240.10b-5(a). This Court has held that "any manipulative or deceptive device or contrivance" in Section 10(b) includes a "scheme; often, a scheme to deceive," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 199 n.20 (1976) (citing the definition of "contrive" in Webster's International Dictionary (2d ed. 1934) as "to fabricate"), and that Section 10(b) applies to "complex securities fraud" in which "there are likely to be multiple violators." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). Rule 10b-5(c) makes it unlawful for "any person," "directly or indirectly," to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . ." 17 C.F.R. 240.10b-5(c).

The information that rendered the statements in Australia false was fabricated in the United States with the expectation that it would be distributed to foreign and domestic investors. Without this domestic misconduct, there would have been no fraudulent release of information in Australia nor a resulting inflation of NAB's stock. As argued by the SEC and the Solicitor General, the domestic conduct was a substantial and material link in the chain of events leading to the foreign investors' losses. The misconduct in Florida was primary, not secondary; central, not incidental. This fraudulent scheme violated the "rules and regulations as the Commission may prescribe . . .", 15 U.S.C. § 78j, namely, Rule 10b-5(a) and (c).[11] Since Petitioners have

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[11] In *Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148 (2008), the Court held, *inter alia*, that: (a) allegations regarding complicit participation by outside vendors in a cable company's fraudulent scheme took place in the realm of ordinary business transactions governed by state law, not the realm of securities markets governed by the SEC; (b) the outside vendors' alleged deceptive acts were not communicated to the public; and (c) defendants had no duty to disclose the alleged transactions. Thus, plaintiffs did not satisfy the reliance element of Section 10(b) and Rule 10b-5 and, therefore, could not allege scheme liability under Section 10(b). *Id.* at 159-61. Here, however, HomeSide was a wholly-owned subsidiary and agent of NAB and, along with the HomeSide individual defendants, were central to NAB's false and misleading conduct, which was in the securities realm and inflated the price of NAB's securities. Furthermore, the HomeSide defendants' misconduct and deceptive acts were communicated to the public through NAB's disclosure of its consolidated financials. SA-4; SA-21 ("following the acquisition of HomeSide in February 1998, [NAB] derives fees from mortgage servicing").

stated a prima facie claim for relief under the Exchange Act, the Court should not proceed further. The Court should reverse the court below and remand the suit for further proceedings.

B. The Court Should Adopt The Test Employed By The Solicitor General And The SEC For Securities Fraud

Once the question of statutory implementation is taken outside the improper mold of subject matter jurisdiction, then the limited case law[12] on transnational fraud claims supports the "material and substantial" test suggested by the SEC and reframed by the Solicitor General as: whether "the scheme involves significant conduct within the United States that is material to the fraud's success." Brief For The United States As Amicus

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[12] Although the court below used the language of "f-cubed" and "transnational" cases, the central allegations in this case concern activities in the Florida subprime mortgage market. Even so, the extent of "transnational" securities fraud cases in the federal courts appears to be modest. According to Cornerstone Research, class action securities filings against "corporations headquartered outside the United States," as a percentage of total filings, peaked in 2007 at 16.4% (of a total of 177 filings), and declined in each of the last two years, first to 13.5% (of a total of 223 filings), and then 12.4% (of a total of 169 filings). Cornerstone Research, *Securities Class Action Filings - 2009: A Year in Review*, at 11 (2010), available at http://securities.cornerstone.com. Moreover, these percentages overstate the number of filings against truly "foreign" issuers, since many corporations "headquartered outside the United States" are multinational organizations with a major presence in the United States.

Curiae at 13. Such a test both recognizes the reality of pervasive transnational effects in a globalized economy, but also affords proper respect to the sovereign interests of multiple nations in frauds not neatly confined within territorial boundaries.

Further, the SEC's and Solicitor General's positions conform to longstanding principles recognized in American law. Such overlapping state interests in fraud perpetrated across national boundaries is anticipated by the Restatement of Law (Third) The Foreign Relations Law Of The United States in discussing the different sorts of national interests that might be implicated. The Restatement identifies certain of these interests as follows:

> for example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality; or when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory; or when a given activity or transaction, such as international trade or transport, takes place in or affects more than one state.

Restatement (Third) of Foreign Relations Law § 403 (Limitations on Jurisdiction to Prescribe) cmt. d (1987).

The Restatement then proposes a test that dovetails with the test suggested by the SEC and the Solicitor General. According to the Restatement: "The United States may generally exercise jurisdiction to prescribe with respect to . . . conduct occurring predominately in the United States that is *related to* a transaction in

securities, *even if the transaction takes place outside the United States.*" *Id.* § 416 (Jurisdiction to Regulate Activities Related to Securities) (emphasis added). Further, the Restatement makes clear that it applies to "situations in which it is generally reasonable for the United States to exercise jurisdiction under § 402(1)(a) (territoriality), even as applied to securities sold outside the United States or to persons who are not United States nationals or residents." *Id.* cmt. a.[13]

Applying this test, HomeSide's and NAB's activity in the United States was at the very least part of a single fraudulent scheme to inflate NAB's stock price.[14]

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[13] Moreover, "[t]he reasonableness of the exercise of jurisdiction depends not only on the territorial links of a given activity with the United States, but also on *the character* of the activity to be regulated. Thus, *an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.*" *Id.* cmt. a (emphases added).

[14] Roughly contemporaneously with the passage of the Exchange Act, the first Restatement of Conflict of Laws anticipated the same outcome: "If consequences of an act done in one state occur in another state, each state in which any event in the series of acts and consequences occurs may apply its law to the event." Restatement of Conflict of Laws: Events Consequent On Act Done In Another State § 70 (Final Drafts Nos. 1-2, 1930). With respect to misrepresentations, the Restatement in 1930 also provided that "[w]hen a communication is sent from one state to another, each state has jurisdiction over the communication." Restatement (First) of Conflict of Laws: Communications Sent From One State To Another § 71 (Final Drafts Nos. 1-2, 1930).

As expressed by the Reporter, Professor Joseph H. Beale, in *A Treatise on the Conflict of Laws* in 1935, a bullet fired from

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In place of the approaches proffered by the SEC or by the Restatement, the court below relied on an erroneous definition of a purported "lengthy chain of causation between the American contribution to the misstatements and the harm to investors." Pet. App. 21a. As a result, the court below held that:

> while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors. While HomeSide's rigging of the numbers may have contributed to the misinformation, *a number of significant events needed to occur before this misinformation caused losses to investors.* This lengthy chain of causation between what HomeSide did and the harm to investors weigh against our exercising subject matter jurisdiction.

Id. (emphasis added).

This conclusion of law confuses unbroken acts of fraud from independent conduct that breaks the causal

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one state into another injuring someone who then dies in a third state implicates the laws of each of the three states. Professor Beale invoked a case in which "the defendant mailed poisoned candy in California to a person in Delaware; the latter ate the candy and died. The defendant was convicted of homicide, under the statute, in California." Joseph H. Beale, *A Treatise on the Conflict of Laws*, Vol. 1, § 65.2 at 315-316 (Baker, Voorhis & Co. 1935) (footnotes omitted).

chain. In *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 482 (2008), the Court found that conduct outside an alleged antitrust conspiracy defeated the claimed causal connection: "ordinary competitive actions undertaken by the defendant competitor cut the *direct* causal link between the plaintiff competitor's injuries and the forbidden acts" (Breyer, J. concurring in part and dissenting in part) (emphasis in original).

This same reasoning cannot be applied here. To begin with, the clear allegations in this case are that the fraud was perpetrated in the U.S., included in filings before the SEC, and that the Australian acts were simply ministerial inclusions – the very reasons identified by the SEC and the Solicitor General as giving rise to subject matter jurisdiction. *Nowhere in the record is there any evidence of any review by, or supposed checkpoints at, NAB.* To the contrary, Petitioners alleged that NAB mechanically incorporated the numbers provided to it by HomeSide as separate line items in its financial statements. JA 5a at A-1455.

Second, the Second Circuit erroneously applied the law of intervening cause. The law of intervening cause assumes an independent causal factor that is not part of the same course of conduct by an independent actor. It must be an outside, independent force that breaks the chain of causation. "A superseding cause is an act of a third person or other force which by its intervention prevents the action from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." W. P. Keaton, *Prosser and Keaton on Torts*, § 44 at 301 n.1 (5th ed. 1984) (quoting Second Restatement of Torts § 440). Compare *Bridge*

v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2144 (2008) (plaintiffs were permitted to sue under RICO because "there are no independent factors that account for respondents' [economic] injury. . ."), with *Anza*, 547 U.S. at 482 (Breyer, J. concurring in part and dissenting in part) ("it is not a 'proximate cause,' if the causal chain from the forbidden act to the injury caused a competitor proceeds through a legitimate business's ordinary competitive activity").

C. The Test Suggested By The Solicitor General And The SEC Would Resolve The Split Among The Circuits

The "materiality" and "substantiality" test set forth by the SEC and the Solicitor General would resolve the split among the circuits concerning "the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998). The courts below have divided between the restrictive test of the District of Columbia Court of Appeals, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) ("jurisdiction will be in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of Section 10(b) and Rule 10b-5"), and the more expansive but imprecise standard of the Third, Eighth and Ninth Circuits, which "generally require *some lesser quantum of conduct*." *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (emphasis added). *See, e.g., Kasser*, 548 F.2d at 114 (conduct comes within the scope of the Exchange Act if "at least some activity designed to further a

fraudulent scheme occurs within the country"); *Continental Grain (Austl.) P'y. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) (Exchange Act provisions applicable when the domestic conduct "was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment").

The test proposed by the SEC and the Solicitor General builds on the Restatement and sets forth a unified standard that would provide greater guidance to the lower courts in resolving future cases. The materiality inquiry would ensure that the domestic conduct was an integral link in the chain of events in the transnational fraud leading to the foreign investors' losses. The substantiality showing would generally be satisfied by demonstrating that a sufficient quantum of conduct occurred in the United States reasonably to warrant application of the Exchange Act.

III. Application Of American Law To Unlawful Conduct Committed In The United States Comports With Traditional Powers Of Sovereignty And Territoriality

A. The Traditional Anglo-American Concept Of Sovereignty Is Based Centrally On Territory

The power of American law to govern all conduct within the nation's territory, regardless of the interest that any foreign nation might also have in such conduct, has been beyond dispute. *See Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is

susceptible of no limitation not imposed by itself."); Restatement (Third) of Foreign Relations Law § 402, cmt. c (2009) ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy"). *See* Joseph Story, *Commentaries on the Conflict of Laws* §§ 18-19 at 21-22 (1865) ("The first and most general maxim or proposition is . . . that every nation possesses an exclusive sovereignty and jurisdiction within its own territory . . . the sovereign may in like manner make laws for foreigners, who even pass through his territories . . . for the preservation of order within his dominion.").

The Court has confronted the application of American law to conduct taking place outside the United States. The presumption established in these cases, frequently invoked by foreign defendants and Americans acting abroad, is that, without a clear statement to the contrary, Congress intends to legislate only for conduct within the United States' territory. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). The corollary is an equally fundamental presumption that, without a clear statement to the contrary, Congress intends to legislate for conduct within the territory of the United States. That presumption holds regardless of the interest that any foreign nation might also have in such conduct. Both of these presumptions are merely partial expressions of the still more fundamental principle articulated by Justice Holmes – and, before him, by the courts of England – that "[a]ll legislation is prima facie territorial." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (quoting *Ex parte Blain*, L.R. 12 Ch. Div. 522, 528 (1879)).

The presumption that Congress intends to legislate for all conduct within the United States regardless of the potential interest of other nations in such conduct is, essentially, the presumption invoked by this Court in *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), regarding the presumptive reach of American law "to foreign-flag cruise ships in United States waters." *Id.* at 125-27.

Describing the presumption that it was applying, the Court stated:

> It is reasonable to presume Congress intends no interference with matters that are primarily of concern only to the ship and the foreign state in which it is registered. It is also reasonable, however, to presume Congress does intend its statutes to apply to entities in United States territory that serve, employ, or otherwise affect American citizens, or that affect the peace and tranquility of the United States, even if those entities happen to be foreign-flag ships.

Id. at 131-32.

The Court relied on the longstanding case authority of *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 12 (1887) ("*Wildenhus's Case*"), which refused a demand by the Belgian consul that Belgium be entitled to prosecute a murder aboard a Belgian ship that was moored at an American port. The fact of American territorial sovereignty trumped Belgium's interest in prosecuting the killing of one of its citizens by another of its citizens. *Id.* at 18.

B. Application Of American Securities Fraud Law To Conduct In The United States Does Not Offend The Principles Of Foreign Relations Law Even If Foreign Nationals Also Are Affected

Independent of its ruling on subject matter jurisdiction, the Second Circuit correctly observed that the potential for conflict between the "the anti-fraud sections of the securities laws" and foreign laws is minimal, because "anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged." PA 17a. (quoting Judge Friendly in *ITT, An Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980)). The court below added that, "[t]he primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than [a foreign state's], that country will surely not be offended by their application." *Id.* Thus, "[t]he problem of conflict between our laws and those of a foreign government is much less of a concern when the issue is the enforcement of the anti-fraud sections of the securities laws than with such provisions as those requiring registration of persons or securities." *Id.*

The Second Circuit's conclusion in this regard is fully supported by the Restatement, which concludes that, when the law of American securities fraud is applied, "the likelihood of conflict with regulation by other states is slight." Restatement (Third) of Foreign Relations Law

§ 416 (1987). Summarizing its findings, the Restatement observes that,

> [i]n contrast to regulation under the antitrust laws which not infrequently involved prohibition of conduct which another state favored or required, United States securities regulation (other than transnational discovery efforts) has not resulted in state-to-state conflict . . . . [N]o instance is known in which a transaction challenged under United States law such as misrepresentation or insider trading – was asserted to be mandated or encouraged by the law of a foreign state.

Id. (citations omitted). *See also* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62 (2007) ("the extraterritorial application of U.S. law in the area of securities regulation has simply not generated the same level of difficulty and hostility as extraterritorial regulation in other areas").

Applying American securities laws to fraudulent conduct that originated in the United States does not conflict with *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), nor *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), which rejected specific extraterritorial applications of, in turn, the United States patent and antitrust laws. The patent and antitrust laws at issue in *Microsoft* and *F. Hoffmann-La Roche*, unlike the fraud provisions of the securities laws, are expressly limited by their own terms to

violations where both the underlying conduct and the injury occurred in the United States.

Thus "[t]he traditional understanding that our patent law 'operate[s] only domestically and d[oes] not extend to foreign activities' is embedded in the Patent Act itself, which provides that a patent confers exclusive rights in an invention within the United States." *Microsoft*, 550 U.S. at 455 (citation omitted). Moreover, the general rule is supported by the fact that "in the area here involved, in particular, foreign law 'may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions.'" *Id.*

Similarly, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), Pub. L. No. 97-290, 96 Stat. 1246, "set[s] forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.'" *F. Hoffmann-La Roche*, 542 U.S. at 158 (quoting 15 U.S.C. § 6a). The only exception, also provided by the FTAIA, is "where the conduct (1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim,'" *id.* at 159 (quoting 15 U.S.C. §§ 6a(1)(A), (2)). Moreover, the general rule is supported by the fact that "[n]o one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs," *id.* at 165, and that "even where nations agree about primary conduct, say, price fixing,

they disagree dramatically about appropriate remedies." *Id.* at 167.[15]

By contrast to the Patent Act and Sherman Act, the antifraud provisions of the securities laws do not contain any language confining their application to violations involving conduct and injuries occurring in the United States, and there is no record of conflicts between the securities fraud provisions of the United States and those of foreign nations. Therefore, any presumption against extraterritorial statutory application has far less basis here than in *Microsoft* or *F. Hoffmann-La Roche.*

IV. The Standard Urged By Petitioners Is Consistent With International Comity

A. Congress Already Took Comity Concerns Into Account In Expressly Providing For The Application Of The Exchange Act To International Commerce

Any comity concerns raised by the application of the antifraud provisions of the Exchange Act to foreign transactions were addressed by Congress in enacting that legislation. While the courts have often remarked that the Exchange Act is "silent as to its extraterritorial application," *e.g., Itoba Ltd. v. LEP Group, LLC*, 54 F.3d

[15] The Patent Act, 35 U.S.C. § 271(f), creates an exception for a certain kind of conduct in the United States that causes an injury that occurs outside the United States; whereas, the FTAIA, 15 U.S.C. §§ 6a(1)(A) & (2), creates an exception for conduct outside the United States that causes an injury inside the United States.

118, 121 (2d Cir. 1995), the Exchange Act and its accompanying regulations in fact anticipate that issue.

Thus, Section 10(b) and Rule 10b-5 by their terms apply to securities fraud conducted "by the use of any means or instrumentality of interstate commerce." 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The Exchange Act in turn defines "interstate commerce" to include "trade, commerce, transportation, or communication among the several States, *or between any foreign country and any State* . . . ." 15 U.S.C. § 78c(a)(17) (emphasis added). Rule 10b-5 thus applies to foreign trade by its terms. Moreover, in setting forth the necessity for securities regulation, the Exchange Act included a Congressional finding that "prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States *and foreign countries* . . . ." 15 U.S.C. § 78b(2) (emphasis added).

Further suggesting congressional awareness of the foreign dimensions of the Exchange Act is Section 30 of the Exchange Act. The first subsection of Rule 30 makes it illegal for "any broker or dealer" to engage in transactions on foreign exchanges that violate rules promulgated pursuant to the Act (such as Rule 10b-5) in any securities issued by United States residents. 15 U.S.C. § 78dd(a). With respect to non-broker dealers, Section 30(b) goes on to provide:

> The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the

> United States, *unless he transacts such business in contravention of the such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent evasion of this chapter.*

15 U.S.C. § 78dd(b) (emphasis added).[16]

The standard urged by Petitioners, the Solicitor General, and the SEC will permit the courts to make flexible case-by-case determinations of the extraterritorial applicability of the antifraud provisions of the Exchange Act, insuring that the interests of comity will be furthered and not offended by each application, notwithstanding the Court's refusal to allow such a case-by-case approach to be used under the express statutory framework of the antitrust laws. *F. Hoffman-LaRoche*, 542 U.S. at 168-69.[17]

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[16] Two of the Circuits have considered, in passing, the impact of Section 30(b) in the context of the extraterritorial. application of Section 10(b). *Zoeslch*, 824 F.2d at 31-32 ; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 984 n.20 (2d Cir. 1975) (Friendly, J.). The salient point is that Congress showed in Section 30 that it was cognizant of the extraterritorial ramifications of the statute, and it knew how to limit the extraterritorial application in particular cases (*i.e.*, broker-dealers), but yet did nothing to limit the statute otherwise.

[17] In addition, district court judges could seek guidance from the United States Department of State as to whether an application of United States law to a foreign securities transaction would violate United States diplomatic policy. In cases where the "act of state" doctrine would ordinarily prevent

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B. Comity Concerns Can Also Be Addressed By Application Of The *Forum Non Conveniens* Doctrine

Concerns relating to comity can also be addressed by application of the *forum non conveniens* doctrine, which gives courts the discretion to decline to hear cases that would more appropriately be heard in a foreign forum. The factors considered by the courts in determining whether to decline to hear a case on this ground include such comity-based ones as the foreign forum's greater interest in having the subject matter tried locally. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (federal courts have discretion to decline to hear cases within their jurisdiction, based on a number of public and private interest factors).

Indeed, the Court has praised the flexibility of the *forum non conveniens* doctrine, as it is "not . . . a rigid rule to govern discretion," but rather lets "'each case turn[ ] on its facts.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (quoting *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549, 557 (1946)). The Court emphasized in *Piper* the valuable role *forum non conveniens* plays in preventing favorable United States law from turning the United States courts into a magnet

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United States courts from adjudicating the conduct of foreign governments, the Department of State has submitted "Bernstein letters" advising the courts when that department has determined that such adjudication would not violate United States interests. *See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972).

for foreign plaintiffs by giving the courts discretion to decline to hear cases whose connection with the United States is tenuous. *See Piper*, 454 U.S. at 251-52. In fact, district courts have declined to hear securities class actions brought by foreign plaintiffs on precisely this basis. *See, e.g., Warlop v. Lernout*, 473 F. Supp. 2d 260 (D. Mass. 2007) (dismissing on *forum non conveniens* grounds an action by Belgian investors who had purchased stock in a Belgian company on a European Exchange and then sued the outside directors in the United States).

In sum, comity concerns should not lead the Court to adopt a bright-line rule against private actions by foreign purchasers. There are other, more flexible ways to deal with such concerns.[18]

V. The Solicitor General's Argument Seeking Dismissal Of Petitioners' Claims – Even Though They Satisfy The Subject Matter Jurisdiction Test – Is Not Supported By The Statute

Petitioners believe that the test for substantial and material relation between the fraud and activity in the United States, as formulated by the Solicitor General

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[18] In addition, unlike the case here where personal jurisdiction did not play a role, limited contacts by foreign parties, such as mere participation in the ADR market, would also act to incorporate indirectly comity concerns by placing such a defendant outside the personal jurisdiction of American courts. *See Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 372 (3d Cir. 2002) (sponsorship of ADRs only provides specific personal jurisdiction for ADR purchasers).

and the SEC, provide the proper analytic framework for determining the reach of American securities laws. As both the SEC in the Second Circuit and the Solicitor General in this Court have argued, under such standards the fact that Florida was the center of the fraudulent conduct readily satisfied the test for subject matter jurisdiction. Indeed, it is difficult to imagine a financial harm that has had more devastating impact on the American economy than securities fraud based on fraudulent subprime mortgages.

In her opposition to certiorari, however, the Solicitor General for the first time argued that even though the statutory basis for subject matter jurisdiction had been met, the complaint should nonetheless be dismissed. Brief For The United States As Amicus Curiae 14-15. In support of this argument, the Solicitor General maintained that because private actions under the Exchange Act are what is termed "implicit" rights of action, they should be construed to limit those who may seek remedies thereunder, and that therefore the Second Circuit's holding should be affirmed – even if the Solicitor General rejected every part of the reasoning below.

This argument has never been pressed in any court below and, to the best of our knowledge, has never been addressed by any court of appeals in any matter.[19] Nor

[19] In *Union Pacific*, the Court reaffirmed the long-standing rule that a respondent may "rely upon any matter appearing in the record in support of the judgment." 130 S. Ct. at 595 (quoting *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982)). There is nothing in the record below that raises the question of a distinction between SEC and private enforcement actions.

was this position advanced by the SEC in its filing before the Second Circuit. Even if the Solicitor General were free to raise any argument in support of affirmance, the Court should not entertain a position from the government contrary to its prior filings in the same action without affording the lower courts a chance to test the claim.

Further, the Solicitor General's argument appears to retread in unaltered fashion the position taken in *Stoneridge* four years ago. At the time, the Solicitor General argued for a limit to aiding and abetting liability in private suits. *Stoneridge Inv. Partners, LLC*, No. 06-43, Brief For The United States As Amicus Curiae Supporting Affirmanance, filed August 15, 2007, Point C of Argument. The government's brief at the time did not address statutes such as the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 *et. seq.* ("PSLRA"), or the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb(f) ("SLUSA"), which designed a detailed litigation regime for private securities fraud claims. In *Stoneridge*, the Court did indeed limit the scope of aiding and abetting liability, but rejected the rationale put forward by the Solicitor General. Instead, the Court read the PSLRA in particular to have "ratified the implied right of action" that had previously been a judicial construct. 552 U.S. at 165. As recognized by the Court in *Stoneridge*, Congress in the PSLRA limited to the SEC the power to enforce claims for aiding and abetting liability. *Id.* at 162-63. The PSLRA did *not* distinguish between public and private enforcement *on any other claim* under the Exchange Act.

Surprisingly, the Solicitor General's opposition to certiorari again does not address the PSLRA (nor even cite to it), and argues in identical fashion as it did in *Stoneridge* about diffuse inherent limitations on the securities private right of action. Most surprisingly, the Solicitor General does not address the Court's ruling in *Stoneridge* with respect to aiding and abetting. Nowhere mentioned is Congress's actions with respect to potential aiding and abetting liability, nor the Court's recognition in *Stoneridge* of the definitive effect of the PSLRA.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded to the Second Circuit in light of *Union Pacific*.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether the judicially created private right of action under Section 10(b) of the Securities Exchange Act of 1934 should extend to claims of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company.

CORPORATE DISCLOSURE STATEMENT

Respondent National Australia Bank Limited has no parent corporation, and no publicly held corporation beneficially owns 10 percent or more of its stock.

Respondent HomeSide Lending, Inc. no longer exists. It was succeeded in interest by Washington Mutual Bank (formerly Washington Mutual Bank, F.A.), which was a wholly owned subsidiary of Washington Mutual, Inc., a publicly traded company. On September 25, 2008, pursuant to Section 5(d)(2)(A) of the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(2)(A), the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation to be Washington Mutual Bank's receiver. *Receivership of a Fed. Sav. Ass'n*, Order No. 2008-36, OTS No. 08551, 2008 OTS DD LEXIS 19 (Office of Thrift Supervision Sept. 25, 2008).

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IN THE

Supreme Court of the United States

No. 08-1191

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

STATEMENT

"The vexing question of the extraterritorial application of the securities laws, Rule 10b-5 in particular," Pet. App. 2a, is how the court of appeals put the issue in this case. Although the court reached the right result, getting there should not have been so difficult. For this putative class action, if certified, would present claims of hundreds of thousands of investors who have *no* connection to the United States or to United States securities markets. The

class would include everyone who purchased, *outside the United States*, the common stock of National Australia Bank, a major foreign bank, over a period of almost two and one-half years.

The Australian petitioners would have a United States District Court entertain such a massive lawsuit here, in the United States, under United States law, and under United States class action procedures, even though the bank's stock, called "ordinary shares," was issued in *Australia* by an *Australian* corporation headquartered in *Australia*; even though the ordinary shares traded exclusively on *Australian* and other *foreign* exchanges, and *not* in the United States; even though the disclosures alleged to have been false were prepared and disseminated in *Australia* by *Australians* to *Australians*, and were filed with *Australian* securities regulators and with the *Australian* Stock Exchange, pursuant to *Australian* laws and rules; even though the Australian petitioners suffered their claimed losses entirely in *Australia*, as the alleged result of their (fraud-on-the-market) reliance on prices on that *Australian* exchange; and, finally, despite the fact that Australia has its own comprehensive scheme of securities regulation that provides ample mechanisms, including opt-out class actions, for redressing securities fraud in Australia.

Merely to state these undisputed facts should have dictated the result. But the Second Circuit was vexed because, for four decades now, it and the other courts of appeals have consistently—and admittedly—disregarded two centuries of statutory construction principles pronounced by this Court. Addressing a statutory provision that "omitted any discussion of its application to transactions taking place outside of the

United States," Pet. App. 6a-7a, these courts set forth rules of decision "based more on policy considerations than on the language of the securities statutes or the Supreme Court's teachings on extraterritoriality," *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997). Undertaking a "dubious" effort to "discern[] a purely hypothetical legislative intent," *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987), they tried to guess "what Congress would have wished" had the question of extraterritoriality "occurred to it," *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). The interpretations they reached wound up having nothing to do with anything in the statute itself: "*We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.*" *Ibid.* (emphasis added).

But this was exactly what judges are *not* supposed to do with statutory language that does not expressly convey extraterritorial intent. The fact that Section 10(b) is "silent on the issue of extraterritorial application" does not mean that the judiciary may serve as the "vehicle" for "defining" the provision's extraterritorial reach. Pet. 16. It is not for "the Judiciary [to] forecast[] Congress' likely disposition" of the question; judges must instead "leave in Congress' court" any question of "extraterritorial thrust." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458-59 (2007). For in the "delicate field of international relations," Congress "alone has the facilities necessary to make fairly such an important policy decision." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Given the absence of any explicit textual command in the statute, courts must presume that Congress did not intend Section 10(b) to apply

extraterritorially, and that Congress did not intend it to supplant the sovereign authority of other nations. Those presumptions make this case straightforward, not vexing, and require that the judgment below be affirmed.

A. The Creation and Expansion of the "Conduct Test"

The federal securities laws had been on the books for more than a quarter century before a federal court first addressed their territorial reach. *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960), applied this Court's decisions—in particular, the presumption against extraterritoriality—to conclude that a transaction on a foreign exchange was not subject to the Securities Exchange Act of 1934. But that may well have been the last time that the controlling canons were assiduously applied to interpret that statute. By 1968, the Second Circuit had held that "the usual presumption against extraterritorial application of legislation" did not apply "when extraterritorial application of the Act is necessary to protect American investors." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *modified en banc*, 405 F.2d 215 (2d Cir. 1968). And by 1975, that court had fashioned what became known as the "conduct test," whereby foreign transactions would be covered by the securities laws if they were "directly caused" by "acts (or culpable failures to act) within the United States." *Bersch*, 519 F.2d at 993.

The idea was to fill the gap left by Congress's silence. Congress "could hardly have been expected to foresee" issues of extraterritoriality, these courts believed, *ibid.*, so it was up to judges to "determine their jurisdiction by divining what 'Congress would have wished' if it had addressed the problem,"

Zoelsch, 824 F.2d at 32 (quoting *Bersch*, 519 F.2d at 993). The lower courts made a "policy decision" in favor of extraterritoriality, hoping that "[b]y finding jurisdiction" for frauds occurring abroad, "we may encourage other nations to take ... reciprocal action against fraudulent schemes aimed at the United States from foreign sources." *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *see also Cont'l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 416, 421 (8th Cir. 1979) (decision "based upon policy considerations," including desire for "reciprocal" foreign enforcement); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (similar).

Had the matter rested with *Bersch*, the judicially invented conduct test at least would have been a rule of "absolute clarity." Pet. App. 72a. Not just *any* domestic conduct causing foreign harm met the test; only domestic conduct constituting the *relied-upon misrepresentations* sufficed. The offshore offerings in *Bersch* were orchestrated from New York City, and the district judge found Section 10(b) to apply to the foreign plaintiffs' claims because there had been but-for domestic causation—"conduct constituting an essential link" in the alleged fraud had taken place "in the United States." *Bersch v. Drexel Firestone, Inc.*, 398 F. Supp. 446, 457 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 519 F.2d 974 (2d Cir. 1975). But the Second Circuit reversed because the misstatements were made abroad and reached their victims abroad. 519 F.2d at 987. *Bersch* thus applied a bright-line rule: Section 10(b) applied only when "all the elements of a defendant's conduct necessary to establish a violation" occurred in the United States—in other words, when misrepresentations to investors were made in the United States. *Zoelsch*, 824 F.2d at 31. With its bright line, the *Bersch*/

Zoelsch location-of-the-lies conduct test would have avoided the "counterproductive" consequences of "a balancing test ... that makes jurisdiction turn on a welter of specific facts"—namely, that of being "inherently unpredictable" and "difficult to apply," and of creating "powerful incentives for increased litigation." *Zoelsch*, 824 F.2d at 32 n.2.

The bright line soon faded, at least outside the D.C. Circuit. *See* Pet. App. 11a-12a n.6. The Second Circuit's decisions after *Bersch* "shift[ed] ... emphasis from a test of strict causation to one of materiality of the domestic acts," spawning "a Hydra of sorts," *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 373 (S.D.N.Y. 2005), that caused "district courts in the Second Circuit [to] have ... difficulty understanding and applying the case law," Pet. App. 61a. One decision even conflated the conduct test with a previously separate "effects test," on the theory that a sliding-scale "'admixture or combination of the two [tests] often gives a better picture'" of whether Section 10(b) should apply abroad. Pet. App. 8a (quoting *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)). Adding to the confusion, other circuits "articulated a number of [other] methodologies." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998).

What resulted was less a body of law than a collection of conclusions—conclusions that unpredictably turned upon "very fine distinctions." Pet. App. 32a. The only certainty was that one case could not be relied upon to decide the next: as three circuits in identical words agreed, in any given case "the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational

securities cases is not necessarily dispositive." *E.g.*, *Cont'l Grain*, 592 F.2d at 414, *quoted in IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), and *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1980). Even within the Second Circuit, the conduct test became not a "cohesive doctrine," but rather a set of "potentially incompatible statements of applicable rules." *Alstom*, 406 F. Supp. 2d at 375.

This we-know-it-when-we-see-it jurisprudence set the stage for the current wave of "f-cubed" or "foreign-cubed" litigation (referring to foreign investors, foreign issuers, and foreign exchanges, *see* Pet. App. 10a, 74a n.14) that this case typifies. Indeterminacy spawned litigation, just as *Zoelsch* had foreseen. By the turn of this century, major foreign issuers began facing f-cubed litigation from their foreign shareholders for their foreign disclosures whenever fraud allegations could be made about United States subsidiaries—on the theory that the underlying American operations sufficed under the conduct test. Given the test's "unpredictability," "the filing of foreign-cubed claims ... increase[d]," with "major [American] plaintiffs' firms ... open[ing] offices in Europe," and foreign plaintiffs "shop[ping] for a U.S. forum ... to take advantage of liberal discovery rules" and "more favorable law," all "generat[ing] excessive levels of conflict with other countries."[1]

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[1] Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 62, 66-67 (2007); *see also* Andrew Longstreth, *Coming to America*, AM. LAW., Nov. 2006, *available at* 11/2006 Am. Law. S53 (Westlaw); Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 2, 2005, at A1.

B. Factual Background and Procedural History

1. Founded in 1858, headquartered in Melbourne, Australia, and organized under Australian law, respondent National Australia Bank Limited ("NAB") was Australia's largest bank and financial institution during the period covered by the complaint. J.A. 41a, 49a; Supp. J.A. 2, 17, 57; Pet. App. 2a. Respondent Frank J. Cicutto served as the company's Managing Director and Chief Executive Officer during that time. J.A. 42a. NAB conducted business across four continents and 15 countries, Supp. J.A. 17, and in 1999 was the third-largest company in Australia by stock-market capitalization, J.A. 49a.

NAB's common shares were widely held—*abroad*. Called "ordinary shares" in the Australian parlance, they have traded principally on the ASX, the Australian Stock Exchange (now the Australian Securities Exchange), the country's primary market, since at least 1974. Supp. J.A. 14, 51; J.A. 41a, 44a; http://bit.ly/nabasx (data sheet on ASX web site). They also traded on the London, Tokyo, and New Zealand stock exchanges. Supp. J.A. 14, 51; *accord* Pet. App. 2a. NAB's ordinary shares *never* traded directly on any exchange in the United States, Supp. J.A. 14, 51; J.A. 41a, 44a; Pet. App. 2a; Pet. Br. 4, and during the period covered by the complaint, few persons with American addresses were registered owners of them. Supp. J.A. 15, 53. Over 98 percent of the shares were held by holders with Australian addresses. Supp. J.A. 15, 53.

A few investors in the United States—but again, not many—owned NAB's American Depositary Receipts, which traded on the New York Stock Exchange and indirectly represented interests in the

ordinary shares. Supp. J.A. 14, 51; Pet. App. 2a, 25a; J.A. 41a, 44a. The Australian petitioners do not contend that their losses resulted from any losses suffered by holders of the ADRs, and, as this case comes to this Court, the "ADR purchasers are not encompassed within the proposed plaintiff class." Pet. Br. 5 n.2; *accord* Pet. 6 n.2. Moreover, ADRs represented only a small fraction—only 1.1 percent—of NAB's equity capitalization. Supp. J.A. 14; Pet. App. 33a, 57a-58a. As a result, "any effect on the United States market from the alleged fraud pales in comparison to the effect on the foreign markets." Pet. App. 33a.

NAB's financial disclosures must comply with Australian laws and rules. NAB must file annual and semiannual disclosures with the Australian Securities and Investment Commission (ASIC), Australia's equivalent of the SEC, as well as with the ASX.[2] NAB must also prepare and file additional "continuous" disclosures with the ASX.[3] NAB's financial disclosures were required to conform to "Generally Accepted Accounting Principles applicable in Australia," which "differ[ed] in ... material respects" from American accounting principles. *E.g.*, Supp. J.A. 18-19; C.A. App. 148-49, 814, 817. Australian law not only provides for public enforcement of these laws

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[2] *See, e.g.*, Corporations Act, 2001, §§ 285, 292, 295, 298-306, 319-20 (Austl.), *available at* http://tinyurl.com/2czx46; AUSTRALIAN STOCK EXCHANGE LIMITED, ASX LISTING RULES 4.2A-4.2C (2010), *available at* http://tinyurl.com/2tnsze; *accord* Corporations Law, 1991, §§ 292-94, 301-10, 317 (Austl.).

[3] *E.g.*, Corporations Act, 2001, § 674 (Austl.); ASX LISTING RULE 3.1; *see* Anthony B. Greenwood, *Securities Regulation in Australia*, *in* 1 INTERNATIONAL SECURITIES REGULATION, Australia Booklet 1, at 22-25 (Robert C. Rosen ed., 2004).

and rules, but it also permits investors to bring private litigation—including opt-out class actions—to redress securities fraud.[4]

Because it had issued ADRs, NAB was also required to file disclosures with the SEC in the United States.[5] These disclosures duplicated NAB's Australian disclosures. On Form 6-K, NAB filed market releases and other continuous disclosures originally issued, filed, and distributed in Australia, *see, e.g.*, C.A. App. 1261-1401,[6] and on Form 20-F, it attached the Australian annual reports that were filed with Australian authorities and distributed to ordinary shareholders in Australia, *compare id.* at 125-289, 442-620, 804-991 (Australian annual reports) *with id.* at 290-441, 622-801, 992-1176 (Forms 20-F).[7] The Australian petitioners "do not allege that they were even aware of the SEC filings, much less relied upon them." Pet. App. 42a n.9. And they do not—and cannot—allege that the SEC filings, as opposed to the previously disseminated Australian disclosures upon which the SEC filings were based, affected prices on

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[4] *See* p. 48, *infra*.

[5] *See, e.g.*, American Depositary Receipts, Securities Act Release No. 33-6894, 1991 SEC LEXIS 936, at *40-*41 (May 23, 1991).

[6] *See also, e.g.*, Rules, Registration and Annual Report Form for Foreign Private Issuers, Exchange Act Release No. 16371, 1979 SEC LEXIS 220, at *3 (Nov. 29, 1979) (Form 6-K is an "interim reporting form" that requires foreign issuers to disclose "material press releases and information sent to foreign securityholders").

[7] *See, e.g.*, International Disclosure Standards, Securities Act Release No. 33-7637, 1999 SEC LEXIS 228, at *7, *20 & n.30, (Feb. 2, 1999) (Form 20-F allows foreign issuers to use their home-country disclosures "as an 'international passport'").

the ASX or otherwise caused the Australian petitioners harm.[8]

2. Petitioners' allegations of fraud stem entirely from disclosures NAB made in Australia about HomeSide Lending, Inc., a company that was based in Jacksonville, Florida, and no longer exists. HomeSide Lending was a fifth-level subsidiary of NAB, and was one of dozens of businesses that NAB owned and operated throughout the world. Supp. J.A. 42-43. In 2000, HomeSide accounted for roughly 4 percent of NAB's after-tax profits, *see id.* at 26, and the value of HomeSide's principal asset—mortgage servicing rights—accounted for approximately 2.4 percent of NAB's total assets, *see id.* at 36.

As the court of appeals correctly observed, respondents "do not contend that HomeSide sent any falsified numbers directly to investors"; HomeSide's results were sent to NAB's headquarters in Melbourne, where, as the court of appeals found, "those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." Pet. App. 21a. Contrary to petitioners' protestations, Pet. Br. 7 n.4, 30, the record indisputably supports this conclusion—because petitioners

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[8] The SEC filings were made days or weeks *after* the substantively identical Australian disclosures were first publicly released, and thus, under the fraud-on-the-market presumption upon which the Australian petitioners rely, J.A. 96a-97a, could not have affected share prices on an efficient market, which would have already absorbed the information included in the Australian disclosures. *See, e.g.*, Supp. J.A. 47-48, 58 (2000 annual report, issued in Australia on November 2 and filed with SEC on November 16); C.A. App. 277, 290 (1999 annual report, issued in Australia on November 4 and filed with SEC on November 17); C.A. App. 1261-65, 1266-71, 1272-78 (releases filed with SEC days after original issuance in Australia).

themselves alleged it. The complaint refers repeatedly to NAB's "balance sheet management" and "risk management" personnel and "internal audit and reporting mechanisms" in Australia; it asserts that "officers and directors of NAB" in Australia were "privy to confidential proprietary information concerning ... HomeSide's operations, business, growth, and financial prospects"; and it claims that the Australian personnel "were directly involved in or responsible for ... the false and misleading public statements" made in Australia about HomeSide. J.A. 44a, 62a, 74a, 76-77a, 81a, 89a.

What is more, the annual reports cited in petitioners' complaint[9] explain how NAB's consolidated results were based upon operating segment results that were "reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior management" of NAB. Supp. J.A. 39; *accord* C.A. App. 690, 879, 1066. The reports describe how NAB's Australian board of directors was responsible for "reviewing internal controls and internal and external audit reports" and "reporting to shareholders and the market." Supp. J.A. 29; *accord* C.A. App. 184, 335, 668, 853, 1040. They explain how the board's audit committee was charged with supervising internal and external auditors and "reviewing the consolidated financial report." *Id.* at 30-31; *accord* C.A. App. 186, 337, 669-70, 855, 1042. The reports conclude with declarations from NAB's Australian board and its

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[9] These disclosures may be considered on a motion to dismiss, of course, as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Australian auditors. *Id.* at 47-48; C.A. App. 277, 428, 786-87, 970-71, 1157-58.

The petitioners are also incorrect in asserting that the "express allegations of the complaint" state that NAB "ministerially" and "mechanically incorporated the numbers provided to it by HomeSide," and that this information was simply "reprint[ed] ... *line-by-line*," in "an exact repetition." Pet. Br. 6, 7 & n.4, 24, 30 (emphasis in original). The allegations petitioners cite for these assertions, C.A. App. 1455 (cited in Pet. Br. 7, 24, 30),[10] say nothing of the sort; they consist of conclusory, boilerplate paragraphs about how the individual defendants were responsible for the corporation's disclosures—general allegations found in any securities complaint.[11] In any event, petitioners' newly minted "mechanical" "line-by-line" "incorporation" claim is contradicted by the fact that NAB's financials, on their face, were *consolidated* statements, *see, e.g.*, Supp. J.A. 39; *accord* C.A. App.

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[10] For reasons they do not explain (*see* Pet. Br. 7 n.5), petitioners cite not the operative complaint that was dismissed, but rather a separate complaint that was filed by another plaintiff, C.A. App. 1450-1502, was immediately withdrawn, *id.* at 1503-05, and was not the subject of the appeal below, *see id.* at 1506. This is of no moment, however, because the allegations petitioners cite are identical to those in their own complaint. *Compare* J.A. 45a-46a *with* C.A. App. 1455.

[11] In fact, petitioners' boilerplate allegations are an almost *word-for-word* repetition of allegations in paragraphs 26 through 28 of the complaint in *Tellabs*. Joint Appendix at 100-01, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (No. 06-484), 2007 WL 444489; *see also* Joint Appendix at 39-40, *Merck & Co. v. Reynolds*, No. 08-905 (U.S. Aug. 10, 2009), 2009 WL 2475435; Joint Appendix at 115a-116a, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932), 2004 WL 2307122.

690, 879, 1066, and by the fact that NAB's disclosures contained very few items setting forth information specifically about HomeSide, *see, e.g.*, C.A. App. 452, 454-79, 498-501, 509-39, 554-66, 597-99.

3. HomeSide suffered setbacks in its core business—mortgage servicing.[12] HomeSide processed homeowners' payments on mortgage loans held by others. C.A. App. 1252. The future fees it would receive for doing this were called "mortgage servicing rights" ("MSRs"), which had a present economic value and were treated as a balance-sheet asset. *See, e.g.*, J.A. 53a; Supp. J.A. 38.

The problem was that MSRs had highly volatile and uncertain values. The reason: homeowners can prepay their mortgages. More prepayments meant fewer future servicing fees and lower MSR values; fewer prepayments meant more future servicing fees and higher MSR values. *See, e.g.*, J.A. 54a. And because homeowners' decisions to refinance and thus prepay depended on interest rates, MSR values were highly sensitive to present and predicted future interest rates. *See, e.g.*, C.A. App. 1257 ("a 2 per cent drop [in interest rates] would slash [MSR values] by nearly two-fifths"). Valuing and hedging MSRs thus involved complex models and debatable predictions about interest-rate movements and their effect on

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[12] Contrary to petitioners' repeated assertions (Pet. Br. 8, 16, 24, 26 n.12, 43), HomeSide's write-downs had nothing to do with the current subprime mortgage crisis. HomeSide's write-downs occurred in 2001, and they did not involve credit losses. *See, e.g.*, Pet. App. 3a-4a, 26a-27a; J.A. 70a-73a. The word "subprime" does not appear in the complaint, *see* J.A. 38a-103a, nor, for that matter, in any of petitioners' papers—until their merits brief in this Court.

prepayment speeds. Even petitioners acknowledge that different companies could—and did—make different prepayment-speed predictions.[13]

Thanks to a series of interest rate cuts, 2001 ended up being a very bad year for MSRs: by year's end, rates had reached 40-year lows. *See, e.g.*, J.A. 78a; C.A. App. 815-16, 1256-57, 1263. Partly as a result, NAB twice wrote down the carrying value of HomeSide's MSRs. The first write-down, in the amount of AU$888 million (US$450 million), took place on July 5, 2001 and reflected "[u]nprecedented refinancing activity" resulting from falling rates. C.A. App. 826, 1263, 1277. This write-down led NAB to hire a consultant "to complete a detailed review of the estimated market sale value" for HomeSide. C.A. App. 1267.

During this review, HomeSide discovered that it had been using mistaken interest rate inputs in its MSR valuation model, and that other assumptions in the model had to be changed in light of turbulent market conditions. *Ibid.* This resulted in a second, much larger write-down of AU$3.05 billion, which NAB announced in Australia on September 3, 2001. *Ibid.*; J.A. 39a, 72a-73a. This write-down consisted of AU$755 million for the interest-rate mistake, AU$1.436 billion for the other changed assumptions, and AU$858 million in goodwill that was written down in anticipation of a sale of HomeSide. C.A. App. 1267-68, 1277.

These losses provoked an uproar in Australia, where the financial press called the write-down the "biggest investment disaster in Australian corporate

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[13] *See* J.A. 84a ("Bloomberg shows each Wall Street firm's view on prepayments").

history." *Id.* at 1258. On September 3, 2001, NAB's ordinary shares dropped AU$4.30, from AU$33.20 to AU$28.90, on the ASX. J.A. 73a. But the shares quickly recovered when NAB sold HomeSide's assets. *See* C.A. App. 1259, 1394. By February 2002, they traded up to AU$34.80—*higher* than they did just before the second write-down. *Id.* at 1258.

4. No shareholder ever sued NAB in Australia to claim that this temporary drop in NAB's stock resulted from securities fraud. Instead, in late 2003, two putative class actions alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), were filed in the district court against NAB, HomeSide, and the individual respondents. The actions were consolidated, and the consolidated complaint asserted claims on behalf of three Australian named plaintiffs—Russell Leslie Owen, and Brian and Geraldine Silverlock—each of whom had purchased NAB ordinary shares on the ASX. The remaining named plaintiff, Robert Morrison, was an American who had purchased ADRs. Pet. App. 4a-5a. No motion for class certification was ever made.

The complaint alleged that Australians had committed a securities fraud in Australia, upon Australians, and on Australian markets. It alleged that the misstatements and omissions that caused the Australian petitioners harm were all made in Australia. The complaint cites and quotes at length numerous financial releases issued by NAB, as well as NAB's annual reports for 1999 and 2000. J.A. 59a-67a, 69a-71a. As the documents themselves reflect, these disclosures were prepared and issued in Australia, *e.g.*, Supp. J.A. 34, 47, 48; C.A. App. 190, 277, 341, 428, 676, 786-87, 1265, and contained

financial statements that were audited by an Australian auditor, Supp. J.A. 48; C.A. App. 277, 428, 787. The complaint also quotes statements made by NAB at an investor lunch in Sydney, J.A. 71a-72a, and statements attributed to the company in the *Australian Financial Review*, Australia's leading financial publication, *id.* at 70a. As for HomeSide and its officers, the petitioners essentially asserted that they had aided and abetted an Australian securities fraud: the American defendants were not alleged to have disseminated false information directly to the Australian investing public, but rather to have sent the information to NAB in Australia, where NAB incorporated it into disclosures prepared and publicly disseminated there. Pet. Br. 6, 24, 25 n.11; Pet. App. 21a; J.A. 59a-67a, 69a-71a.

Petitioners alleged that causation and reliance occurred in Australia as well. Relying on the fraud-on-the-market presumption of reliance, they alleged that NAB's "material misrepresentations and omissions" "directly or proximately caused" their losses by "inflating the price of NAB's securities." J.A. 95a-97a. For the Australian petitioners, of course, this loss-causing price inflation occurred in Australia, on the ASX, where they claim to have purchased their ordinary shares at inflated prices.

5. Respondents moved to dismiss the Australian petitioners' claims on the ground, among others, that they exceeded the territorial reach of Section 10(b). Pet. App. 28a; J.A. 25a-26a. Respondents conceded that Section 10(b) applied to the claims of the domestic ADR plaintiff, Morrison, but urged dismissal of his claims on other grounds. Pet. App. 28a n.6. The district court granted respondents' motions. *Id.* at 23a-45a. It held that the Australian petitioners'

claims failed both the effects test and the conduct test. *Id.* at 33a-42a. "HomeSide's alleged conduct" was "not in itself *securities* fraud," the court concluded, and "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad," *id.* at 41a (emphasis in original). The court emphasized that all of the elements of the Australian plaintiffs' claims took place in Australia. *See id.* at 41a-42a. The court separately dismissed Morrison's domestic ADR claim because he had failed to plead damages. *Id.* at 43a-45a.

6. The court of appeals affirmed. Pet. App. 1a-22a. The court upheld the dismissal of Morrison's domestic ADR claims because he did not challenge it. *Id.* at 5a n.3; *see also* Pet. Br. 5 n.2 (claims of ADR holders no longer at issue); Pet. 6 n.2 (same). Although the court refused to apply the presumption against extraterritoriality, Pet. App. 15a-17a, it nonetheless held that the Australian petitioners' claims exceeded the territorial scope of the federal securities laws. It held that the Australian petitioners' claims failed the conduct test because the "heart" of the alleged securities fraud had been in Australia. Pet. App. 18a-19a. The actions there, the court held, were "significantly more central to the [alleged] fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a.

The court held that a "particular mix" of three "significant factor[s]," *id.* at 20a, 22a, led to this conclusion: *first*, that it was NAB in Australia, not HomeSide in Florida, that was "the publicly traded company," and that it was thus NAB's executives and advisors who bore "primary responsibility" for NAB's disclosures, *id.* at 19a; *second*, "the striking absence

of any allegation that the alleged fraud affected American investors or America's capital markets," *id.* at 20a; and *third*, "the lengthy chain of causation between the American contribution to the [alleged] misstatements and the harm to investors"—in particular, the fact that petitioners did not "contend that HomeSide sent any falsified numbers directly to investors," *id.* at 21a. In addressing the last factor, the court noted that the alleged domestic conduct could not have supported a finding of reliance, and thus liability, under *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). Pet. App. 21a.

In reaching its decision, the court of appeals once again observed that Congress had provided no indication that Section 10(b) applies extraterritorially. Pet. App. 6a-7a. And the court again explained that the conduct test was an attempt to "discern [what] 'Congress would have wished'" and "would have wanted." *Id.* at 7a (citation omitted).

The court "respectfully urge[d]" that Congress address the subject. *Id.* at 7a n.4.

SUMMARY OF ARGUMENT

At issue in this case is a question of statutory interpretation: whether Section 10(b) of the Securities Exchange Act of 1934 should be construed to apply extraterritorially to extend a private right of action to foreign investors who claim to have suffered losses from their purchase, on a foreign exchange, of securities of a foreign issuer.

Answering that question implicates two separate canons of construction. The first is the presumption against extraterritoriality. That presumption is a clear-statement rule that requires courts to look for

statutory language that clearly expresses an affirmative intention of Congress to apply the statute extraterritorially. *E.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The petitioners here have failed to identify any such clear statement of congressional intent. Instead, they rely principally on the fact that the Exchange Act's definition of "interstate commerce" includes a reference to commerce "between any foreign country and any State." 15 U.S.C. § 78c(a)(17). But such "boilerplate language ... can be found in any number of congressional Acts," and does not suffice to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251. Nor can the petitioners avoid the presumption by arguing that they complain of harm resulting from domestic conduct. The foreign losses they allege resulted principally from foreign conduct, and this Court has applied the extraterritoriality canon in cases having far greater domestic connections than this one.

The second canon of construction is the *Charming Betsy* rule—that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)—a rule that applies even when the presumption against extraterritoriality does not. This canon presumes that Congress seeks to follow principles of customary international law when it legislates, and thus requires courts, in the absence of a clear and contrary congressional statement, to assume that statutes incorporate international choice-of-law principles. The law of nations in 1934, the year the Securities Exchange Act was enacted, unwaveringly applied the principle of *lex loci delicti* to claims of fraud, including securities fraud. As a result, Congress must be presumed to have intended

that transactions on foreign exchanges must be governed by foreign law. But even if *lex loci* were not deemed to have been incorporated into the Exchange Act, the application of Section 10(b) to foreign transactions would constitute an unreasonable interference with the sovereign authority of other nations under this Court's decision in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). For such an extraterritorial application of Section 10(b) would supplant, with insufficient justification, the substantive laws and remedies that foreign countries have provided for conduct and transactions on their own soil.

Finally, these canons of construction are reinforced by the fact that the private right petitioners seek to invoke is purely of judicial creation. This Court has made clear that, because it was inferred, the Section 10(b) right of action should not be further extended, and that practical considerations warrant limitations on that right. The threat posed by extraterritorial application of Section 10(b) to the sovereign authority of other nations is a far more significant practical justification for limiting the inferred right than those noted by this Court in prior cases. The Court should accordingly limit the Section 10(b) inferred right to persons who purchased or sold securities in the United States.

ARGUMENT

Petitioners' principal submission is that the decision below must be reversed because the Second Circuit—like virtually every lower court that has addressed the territorial scope of Section 10(b) for more than four decades—mistakenly treated the question as being one of "subject matter jurisdiction." Pet. Br. 14-18, 45.

Petitioners are right that this characterization was wrong,[14] but that does not help them here. For "nothing '*turned upon* whether [the issue] was technically jurisdictional.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 (2006) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91 (1998) (emphasis in original)). There is no issue of waiver or forfeiture, for example, that hinges on whether the extraterritoriality question is deemed jurisdictional or substantive. *See, e.g., Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 596-97 (2009); *Arbaugh*, 546 U.S. at 510-11, 514. The dispositive issue is precisely the one raised and decided below: does Section 10(b) apply extraterritorially to provide the Australian petitioners a claim for relief? This Court may properly decide that question, "ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute," *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)—just as it has repeatedly done in other cases where lower courts treated extraterritoriality as a matter of subject-matter jurisdiction.[15]

Petitioners thus cannot avoid the non-jurisdictional question they phrased and presented to this Court: "Whether the antifraud provisions of the United

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[14] *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959); Br. in Opp. 11 n.7; U.S. Cert. Invit. Br. 8-9.

[15] *See Empagran*, 542 U.S. at 163-75, *rev'g* 315 F.3d 338, 341 (D.C. Cir. 2003); *Smith v. United States*, 507 U.S. 197, 203-04 (1993), *aff'g* 953 F.2d 1116, 1120 (9th Cir. 1991); *Aramco*, 499 U.S. at 248-59, *aff'g* 892 F.2d 1271, 1272 (5th Cir. 1990) (en banc); *Romero*, 358 U.S. at 358, 381-84.

States securities laws extend to transnational frauds" under the circumstances alleged in this case. Pet. i (Question I). The answer, under the presumption against extraterritoriality, under the *Charming Betsy* rule, and under this Court's decisions addressing the scope of the Section 10(b) inferred right, is no.

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY BARS PETITIONERS' "FOREIGN-CUBED" CLAIMS.

The Australian petitioners' foreign-cubed claims are barred by "[t]he presumption that United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). Even apart from the fact that they are invoking a purely inferred right of action found nowhere in the text of the Securities Exchange Act, petitioners have failed to identify any language in that Act requiring that Section 10(b) be applied extraterritorially to claims of fraud on a market on the other side of the globe.

A. The presumption against extraterritoriality requires that Congress make a clear statement of its intent to apply a law extraterritorially.

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)). This presumption against extraterritoriality requires courts to determine whether statutory language explicitly conveys "'a congressional purpose to extend its coverage beyond places

over which the United States has sovereignty or has some measure of legislative control.'" *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285). And "in case of doubt," the Court must construe the statute "to be confined in its operation and effect to the territorial limits" of the United States. *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925). Accordingly, "unless there is 'the affirmative intention of the Congress clearly expressed,'" a federal statute cannot be applied extraterritorially. *Aramco*, 499 U.S. at 248 (citation omitted).

The presumption is "rooted in a number of considerations," *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)—at least three. One is the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Ibid.*; *accord Foley Bros.*, 336 U.S. at 285.

A second is the "desire to avoid conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993). Application of American laws to foreign conduct or events "'not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.'" *Chisholm*, 268 U.S. at 31-32 (citation omitted). The presumption thus "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.

Third, the presumption embodies judicial deference to Congress in the sensitive area of foreign affairs. Congress is "able to calibrate its provisions in a way that we cannot," *Aramco*, 499 U.S. at 259, and of course "the sign of how far Congress has chosen to go can only come from Congress." *Microsoft*, 550 U.S. at

444 (citation and internal quotation marks omitted). Accordingly, the question of whether and to what extent a statute has "extraterritorial thrust" must be left "in Congress' court," and the judiciary must not try to "forecast[] Congress' likely disposition" of the issue, by trying to divine extraterritorial meaning from an equivocal text. *Id.* at 458-59. The presumption thus "leaves to Congress' informed judgment any adjustment [of the law that] it deems necessary or proper." *Id.* at 442.

The presumption against extraterritoriality is a powerful one. It is a "clear statement" rule of which Congress is well "aware[]," as "amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." *Aramco*, 499 U.S. at 258. And it is the party asserting extraterritorial effect—here, the Australian petitioners—"who must make the affirmative showing" by identifying statutory "language [that] speak[s] *directly* to the question presented." *Id.* at 250 (emphasis added). The Australian petitioners must thus identify "'specific language'" in the Securities Exchange Act of 1934 "reflecting congressional intent" "to apply the statute abroad." *Id.* at 251-52 (citation omitted). They must cite actual statutory "'words which definitely disclose an intention to give [the law] extraterritorial effect.'" *Id.* at 251 (quoting *Chisholm*, 268 U.S. at 31). Merely "possible, or even plausible, interpretations of language" suggestive of extraterritoriality do not suffice. *Id.* at 253; *accord Microsoft*, 550 U.S. at 442 ("[p]lausible" reading rejected). If the statute's language is "ambiguous," *Aramco*, 499 U.S. at 250, if it leaves "any lingering doubt regarding [its] reach," then the law applies "only within the territorial jurisdiction of the United

States," *Smith*, 507 U.S. at 203-04 (citations and internal quotation marks omitted).

B. Congress made no clear statement that Section 10(b) should apply extra-territorially.

Retracting their earlier position that "the Exchange Act [is] silent on the issue of extraterritorial application," and that the most that could be said was that "[t]here is no language foreclosing it," Pet. 16, petitioners have now parsed the statute for extra-territorial intent. Their search has proven fruitless.

1. In Section 10(b) itself, all the petitioners and their *amici* point to are its reference to "any means or instrumentality of *interstate commerce*," and to the fact that it applies to "any security," including "any security not ... registered" "on a national securities exchange." 15 U.S.C. § 78j(b) (emphasis added); *see* Pet. Br. 23, 39; Alecta Br. 10-11. The mention of "interstate commerce" demonstrates extraterritorial intent, they say, because "interstate commerce" includes some foreign commerce—commerce "between any foreign country and any State." 15 U.S.C. § 78c(a)(17); *see* Pet. Br. 23, 39; Alecta Br. 8-9. As for the reference to securities not "registered on a national securities exchange," *amici* (but not petitioners) take that to mean securities traded on exchanges outside the United States. Alecta Br. 10-11.

Even without the presumption, these arguments fail. Commerce "between any foreign country and any State" does not cover communications and transactions that occur entirely *outside* the United States, such as the Australian disclosures that allegedly inflated stock prices on the ASX, and the trades on the ASX from which the Australian petitioners claim

loss here.[16] As for Section 10(b)'s statement that it regulates "any" security not "registered on a national securities exchange," all that refers to are transactions of *unlisted* securities, not to securities traded abroad. This language simply shows that Section 10(b) applies to "the purchase or sale of securities whether conducted in the organized markets or *face to face*." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (emphasis added); *accord SEC v. Zandford*, 535 U.S. 813, 822 (2002).

And this Court's cases applying the presumption against extraterritoriality have repeatedly rejected the arguments petitioners and their *amici* make here. In particular, this Court has made clear that use of the word "any," as in the phrase "any security not so registered" here, does not make a law territorially illimitable. "'Words having universal scope ... will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch.'" *Foley Bros.*, 336 U.S. at 287 n.3 (citation omitted). Laws prohibiting acts "by 'any person or persons,'" while "'broad enough to comprehend every human being,'" must, despite their "literal universality," be "'limited to cases within the jurisdiction of the state'" and "'to those objects to which the legislature intended to

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[16] This reading is confirmed by the legislative history. The language about commerce "between any foreign country and any State" was taken from the Securities Act of 1933. *See* 15 U.S.C. § 77b(a)(7). It was added there simply to ensure "statutory coverage of foreign securities trading *in the United States*." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 700 (1990) (emphasis added). The legislative history of both statutes reflects that Congress "chose to protect only those investors whose trades occur inside the United States." *Id.* at 681.

apply them.'" *Lauritzen v. Larsen*, 345 U.S. 571, 577-78 (1953) (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.)). In short, use of "broad, inclusive language" like "'[e]ach'" or "'any'" or "'[e]very'" "is not sufficient to overcome the presumption against the extraterritorial application of statutes." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 586-87 n.4 (1992) (Stevens, J., concurring in the judgment; citations omitted); *see, e.g.*, *Aramco*, 499 U.S. at 249 (rejecting extraterritorial application of law applying to "'any activity, business, or industry in commerce'"; citation omitted); *Foley Bros.*, 336 U.S. at 282, 287-88 (rejecting extraterritorial application of law referring to "'[e]very contract made to which the United States ... is a party'"; citation omitted).

The Court has also expressly rejected textual arguments that, like petitioners', rely upon "boilerplate language" about foreign commerce. *Aramco*, 499 U.S. at 251. Such contentions "find[] no support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad." *Ibid.* (emphasis in original). Language like that "can be found in any number of congressional Acts," *Aramco*, 499 U.S. at 251, and thus provides an "insufficient indication to override the presumption against extraterritoriality," *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting), because "there would be little left of the presumption" otherwise, *Aramco*, 499 U.S. at 253.

For example, the Federal Employers' Liability Act provides remedies for employees against railroads "engaging in commerce between ... any of the several States or Territories ... and any foreign nation or nations," 45 U.S.C. § 51—essentially the same lan-

guage invoked here. Yet this Court in *Chisholm* held that FELA "contains no words which definitely disclose an intention to give it extraterritorial effect," and ruled that FELA did not apply to the claim of the estate of an American citizen against an American carrier on a train running from the United States into Canada—because the decedent had "suffered [his] fatal injuries at a point thirty miles north of the international line." *Chisholm*, 268 U.S. at 30-31. Similarly, the National Labor Relations Act addressed commerce "between any foreign country and any State"[17]—again, essentially, as here—and yet the Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), "refused to find a congressional intent to apply the statute abroad because there was not 'any specific language' in the Act reflecting congressional intent to do so." *Aramco*, 499 U.S. at 251-52 (quoting 372 U.S. at 19). And in *Aramco*, this Court held that Title VII's reference to employers who "'affect[] commerce'" "'between a State and any place outside thereof'" did not render the statute applicable to discrimination by an American employer against an American employee in a foreign country. *Id.* at 249, 253 (quoting 42 U.S.C. § 2000e(b), (g)).

Petitioners' reliance upon the text of Section 10(b) thus fails.

2. Even less availing to petitioners and their *amici* is their invocation of other sections of the Exchange Act. In particular, they identify a section of the Exchange Act that actually *does* address extraterritoriality—Section 30(b). Pet. Br. 39-40; Alecta Br. 12.

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[17] 29 U.S.C. § 152(6), *quoted in McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 15 n.3 (1963).

Entitled "Foreign Securities Exchanges," Section 30 provides, in subsection (b), that the Exchange Act "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). This provision thus specifically authorizes the SEC to promulgate regulations applicable to extraterritorial activities of people conducting a "business in securities" when necessary to accomplish domestic regulatory goals. The SEC has apparently never issued any rule or regulation under Section 30(b), and this case does not involve any "business in securities."

Section 30(b) actually hurts petitioners' cause, and quite badly. It "specifically restricts the Act to the transaction of business *within* the United States," *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960) (emphasis added); *see also Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31-32 (D.C. Cir. 1987), and creates only a narrow, potential, SEC-gatekept extraterritorial application that does not apply here. What is more, the extraterritoriality language of Section 30(b) actually "buttresse[s]" the conclusion that Section 10(b), which contains no such language, does not apply extraterritorially. *Aramco*, 499 U.S. at 258. For Section 30(b) demonstrates that, "[w]hen it desires to do so," Congress knows exactly how to affirmatively express an intent to regulate extraterritorial securities-related activity—just as it "'knows how to place the high seas within the jurisdictional reach of a statute.'" *Ibid.* (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)).

The same is true of an adjacent—and even more pertinent—provision, Section 30(a). That subsection explicitly addresses *transactions on foreign exchanges*. It authorizes the SEC to adopt rules and regulations covering transactions in securities of American issuers that are "effect[ed]" by "any broker or dealer" "*on an exchange not within or subject to the jurisdiction of the United States*," and makes it unlawful for brokers and dealers to violate those rules. 15 U.S.C. § 78dd(a) (emphasis added). Section 30(a) obviously does not apply in this case: it regulates *only* brokers and dealers, *only* trades in securities of *domestic* issuers, and *only* to the extent provided by the SEC.

But Section 30(a) is fatal to petitioners' statutory construction argument here. It shows that Congress knew exactly how to make a clear statement of an intent to regulate transactions on foreign exchanges. Congress made just such a statement in Section 30(a); it did *not* make one in Section 10(b).[18]

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[18] The other textual arguments made by petitioners and their *amici* are frivolous. The language in Section 2—the Act's statement of necessity—referring to "prices ... generally disseminated and quoted throughout the United States and foreign countries," 15 U.S.C. § 78b(2); *see* Pet. Br. 39; Alecta Br. 9, refers to prices of "transactions [on] securities exchanges and over-the-counter markets," 15 U.S.C. § 78b. Nothing in Section 2 suggests that this refers to exchanges or markets or transactions in foreign countries; to the contrary, Congress made clear it was referring to "transactions in securities [that] are affected with a *national* public interest." *Ibid.* (emphasis added).

Section 2's reference to trading "volume [that] in large part originate[s] outside the States in which ... exchanges and over-the-counter markets are located," Alecta Br. 9 (quoting 15 U.S.C. § 78b(1)), merely acknowledges that trades come to domestic exchanges from customers throughout the country.

C. Petitioners seek to apply Section 10(b) extraterritorially.

Unable to tease a clear statement of extraterritorial intent from Section 10(b), petitioners seek to avoid the presumption against extraterritoriality altogether. Though they themselves have characterized this case as involving "the *extraterritorial* application of the antifraud provisions of the federal securities laws," Pet. 16 (emphasis added), petitioners now say, in essence, that the case really does not involve extraterritoriality at all. *See, e.g.*, Pet. Br. 25, 33. This contention is meritless.

1. The claim that this case is "primar[il]y," "central[ly]," Pet. Br. 25, and "overwhelming[ly]," Alecta Br. 14, about domestic activity simply ignores the allegations and the reality of the Australian petitioners' class-action complaint. These *Australian* plaintiffs live and bought shares in *Australia*; they allegedly suffered their losses in *Australia*, on an *Australian* exchange; and now, on behalf of every *Australian* who suffered similar harm, they seek to recoup large sums from the *Australian* issuer who they say prepared and issued the allegedly false disclosures in *Australia* that caused these losses. If ever there was a case where parties were demanding that American law "appl[y] in foreign countries," *Lujan*, 504 U.S. at 586 (Stevens, J., concurring in the judgment), that it govern "conduct that is 'the

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Finally, Section 27's provision for venue either where a violation occurred or where a defendant may be found, *see* Alecta Br. 13 (citing 15 U.S.C. § 78aa), offers a meaningful venue choice even in purely domestic cases. Had Congress really intended extraterritoriality, it would have established a third venue option for cases in which the violation took place, and the violators could only be found, abroad.

primary concern of a foreign country,'" *Pasquantino v. United States*, 544 U.S. 349, 378 (2005) (Ginsburg, J., dissenting; quoting *Foley Bros.*, 336 U.S. at 286), and that it *not* "'be confined in its operation and effect to the territorial limits'" of the United States, *Chisholm*, 268 U.S. at 32 (citation omitted), this is it.

2. That should be enough to dispose of petitioners' argument, but there is more. This Court has repeatedly rejected, on extraterritoriality grounds, claims in cases having far greater domestic connections to the United States than this one. This Court's decisions, indeed, refute the claim, made here, that "the presumption bars application of a federal statute" only "when the relevant conduct occurs *entirely* outside the United States." Alecta Br. 17-18 (emphasis in original).

New York Central v. Chisholm provides a stark example. The American decedent had suffered fatal injuries while working for his American employer on a train traveling from Malone, New York, to Montreal, but because the accident took place thirty miles north of the border, this Court held that FELA did not apply to this barely extraterritorial event. 268 U.S. at 30-32. Similarly, in *Foley Brothers v. Filardo*, the American plaintiff had been hired in the United States by an American company that entered into a contract with the United States to do construction work abroad, and had agreed in that contract to abide by the laws of the United States. 336 U.S. at 282-83; *see Filardo v. Foley Bros.*, 297 N.Y. 217, 219-20 (1948), *rev'd*, 336 U.S. 281 (1949). This Court held that the Eight Hour Law did not apply "to work performed in foreign countries." 336 U.S. at 284. So, too, in *EEOC v. Aramco*: an American citizen, hired by an American company pursuant to an employment

contract made in the United States, was shipped off to work overseas. 499 U.S. at 247. Title VII did not apply to the discrimination the plaintiff alleged to have suffered abroad. *Id.* at 259.

But the most analogous case is the most recent one. The invention at issue in *Microsoft v. AT&T*, a technology for encoding and compressing recorded speech, was patented by AT&T in the United States. 550 U.S. at 441. There was no question that Microsoft had induced infringement of this patent in the United States; Microsoft's Windows operating system included software code written in the United States that, when loaded onto a personal computer, enabled PCs to process speech the same way AT&T's invention did. *Id.* at 441-42, 445-46. At issue was the fact that Microsoft, in the United States, also shipped "master" copies of Windows from the United States to places abroad, where the software was then copied and installed on PCs. *Id.* at 441-42, 445-46. The question was whether Microsoft could be held liable for inducing infringement abroad—specifically, whether Microsoft had "'supplie[d] ... from the United States,' for 'combination' abroad, 'components' of AT&T's patented speech processor." *Id.* at 441-42, 446-47 (quoting 35 U.S.C. § 271(f)).

These facts track the allegations here: HomeSide generated allegedly false raw information in the United States (cf. the Windows code), that information was sent from the United States to a foreign country in a form that was not publicly disseminated (cf. the "master" copies), and then the information was combined with other information into consolidated financials and incorporated into NAB's public disclosures, which were disseminated abroad and caused harm abroad (cf. the creation of installation

copies and their installation into the PCs). *Cf. id.* at 445-46.

As petitioners do here, AT&T argued that the presumption against extraterritoriality did not bar its infringement claim because material conduct took place in the United States. Indeed, AT&T correctly pointed out that the Patent Act, "by its terms, applies only to domestic conduct, *i.e.*, to the supply of a patented invention's components 'from the United States.'" *Id.* at 456 (quoting 35 U.S.C. § 271(f)). AT&T reasoned that, accordingly, because it was only seeking damages for a domestic wrong, "the presumption holds no sway here." *Id.*

This Court rejected AT&T's argument: "AT&T's reading ... 'converts a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad].'" *Ibid.* (citation omitted). Petitioners here similarly seek to convert the transmission of financial information from an American subsidiary to a foreign parent into a massive springboard for liability each time a foreign shareholder—of which here there were hundreds of thousands, *see, e.g.*, Supp. J.A. 53—purchases shares of the foreign parent on a foreign exchange.

Indeed, the presumption against extraterritoriality surely should apply even more strongly in this case, if that is possible. Not only does the Patent Act provide expressly for a private right of action (as opposed to the judicially inferred right here), but it also expressly provides for *some* degree of extraterritorial application, *see* 550 U.S. at 455; 35 U.S.C. § 271(f);

the question in *Microsoft* was how much.[19] Section 10(b) does nothing of the sort.

3. Beyond this, the fact that some underlying conduct occurred in Florida is meaningless for purposes of Section 10(b), and does not render the presumption against extraterritoriality inapplicable, because that alleged domestic conduct was not "*securities* fraud." Pet. App. 41a (emphasis in original). The elements of the Australian petitioners' securities fraud claim—"the allegedly knowing incorporation of HomeSide's [allegedly] false information ... in public filings and statements made abroad ... to investors abroad ... who detrimentally relied on the information in purchasing securities abroad," *id.* at 41a-42a—all occurred in Australia.

The Australian petitioners' contrary suggestion—that HomeSide's domestic conduct was by itself actionable under a theory of "scheme liability," Pet. Br. 22; *see also id.* at 25-26; Alecta Br. 15—fails under this Court's decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008), which rejected an analogous "scheme liability" claim. Petitioners "do not contend that HomeSide sent any falsified numbers directly to investors," Pet. App. 21a, and they do not contend that HomeSide and its officers engaged in deceptive acts that they communicated to the public. They argue instead that the allegedly false information

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[19] The Court observed that "'the presumption is not defeated ... just because [a statute] specifically addresses [an] issue of extraterritorial application,'" but rather "remains instructive in determining the *extent* of the statutory exception." 550 U.S. at 455-56 (emphasis added; quoting *Smith*, 507 U.S. at 204, and citing *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161-62, 164-65 (2004)).

was "communicated to the public through *NAB's* disclosure of its consolidated financials"—and that it was thus "*NAB's* ... conduct" that "was in the securities realm and inflated the price of NAB's securities." Pet. Br. 25 n.11 (emphasis added). HomeSide's conduct was not in this "securities realm," but in the realm of business operations.

This is *Stoneridge* redux. The Australian petitioners impermissibly seek to apply Section 10(b) "beyond the securities markets" and in the "realm of ordinary business operations." *Stoneridge*, 552 U.S. at 161. For "[i]t was [NAB and its Australian officers], not [HomeSide and its American officers], [who allegedly] filed fraudulent financial statements; nothing [HomeSide] did made it necessary or inevitable for [NAB] to record the transactions as it did." *Ibid.* As the court of appeals observed—and as the complaint and the record establish, *see* pp. 11-14, *supra*—HomeSide's "problematic numbers ... had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors," and "a number of significant events needed to occur before this misinformation caused losses to investors." Pet. App. 21a; *cf. Hemi Group, LLC v. City of N.Y.*, No. 08-969, slip op. at 12 (U.S. Jan. 25, 2010) (opinion of Roberts, C.J.; proximate cause lacking because "[m]ultiple steps ... separate the alleged fraud from the asserted injury").

As in *Stoneridge*, the HomeSide respondents "had no duty to disclose," "their deceptive acts were not communicated to the public," and "[n]o member of the investing public had knowledge, either actual or presumed, of [their] deceptive acts during the relevant times." 552 U.S. at 159. The alleged domestic acts accordingly "do not suffice to 'show reliance ...

except in an indirect chain that [is] too remote for liability.'" Pet. App. 21a (quoting *Stoneridge*, 552 U.S. at 159). The fact that HomeSide was a subsidiary of NAB does not change this conclusion. *See Pugh v. Tribune Co.*, 521 F.3d 686, 696-97 (7th Cir. 2008) (rejecting claims against employees of newspaper subsidiary who forwarded false circulation information to corporate parent).

4. Finally, even if the link between the domestic conduct and petitioners' foreign losses could be said to be direct, their claims would still be extraterritorial—as illustrated by this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). There, the Court addressed the so-called "headquarters doctrine" under the "foreign country" exception to the Federal Tort Claims Act's waiver of sovereign immunity. The DEA had approved and executed a plan to hire Mexican nationals to seize another Mexican national, Alvarez, in Mexico, and to bring him to the United States. *Id.* at 698. Alvarez sued the Government for damages, and the Government asserted sovereign immunity on the ground that his claim was a "'claim arising in a foreign country.'" *Id.* at 700 (quoting 28 U.S.C. § 2680(k)). The seizure itself certainly happened in a foreign country, but Alvarez argued that his claim arose in the United States under the FTCA because his "abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California." *Id.* at 702.

This Court rejected this "headquarters doctrine" argument—even though it "assume[d] that the direction by DEA officials in California was a proximate cause of the abduction." *Id.* at 704. "[A] given proximate cause need not be, and frequently is not,

the exclusive proximate cause of harm," the Court explained, and "the actions of Sosa and others in Mexico" acting for the DEA "were just as surely proximate causes, as well." *Ibid.* As a result, "recognition of additional domestic causation" did not establish that Alvarez's claim arose in the United States. *Ibid.* So it is here as well: the Australian petitioners' contention that "the domestic conduct was a substantial and material link in the chain of events leading to the foreign investors' losses," Pet. Br. 25, does not overcome the existence of proximate cause in Australia, and does not make their claims domestic in nature—particularly since "headquarters" here was in a foreign country, and not, as in *Sosa*, in the United States. *Sosa*, 542 U.S. at 701-02.

In short, the Australian petitioners' claims arose in a foreign country. The presumption against extraterritoriality unquestionably controls.

II. THE PRESUMPTION AGAINST INTERFERENCE WITH THE SOVEREIGN AUTHORITY OF OTHER NATIONS BARS PETITIONERS' "FOREIGN-CUBED" CLAIMS.

A second, separate canon of construction also would preclude the Australian petitioners' claims even if the presumption against extraterritoriality did not apply: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). "This canon is 'wholly independent' of the presumption against extraterritoriality," and it applies even "if the presumption against extraterritoriality has been overcome or is otherwise inapplicable." *Hartford Fire*, 509 U.S. at 814-15 (Scalia, J., dissenting; citation omitted).

Even apart—again—from the fact that they invoke a right of action not found in the statutory text, petitioners' reading of Section 10(b) cannot be squared with this rule.

A. The presumption that Congress legislates consistently with customary international law is a clear-statement rule.

Charming Betsy requires that courts "must assume" that "Congress ordinarily seeks to follow" "principles of customary international law." *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). "By usage as old as the Nation, [American] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953). Specifically, "'the law of nations,' or customary international law," includes choice-of-law principles that place "limitations on a nation's exercise of its jurisdiction to prescribe," and "'in the absence of a contrary congressional direction,'" these "choice-of-law principles ... are assumed to be incorporated into our substantive laws having extraterritorial reach." *Hartford Fire*, 509 U.S. at 815, 817 (Scalia, J., dissenting; quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959)). This "practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence," *id.* at 818 (Scalia, J., dissenting), and "help[s] ensure that 'the potentially conflicting laws of different nations' will 'work together in harmony,' a matter of increasing importance in an ever more interdependent world," *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and in the judgment; quoting *Empagran*, 542 U.S. at 164).

Like the presumption against extraterritoriality, the *Charming Betsy* rule is a clear-statement rule: "for us to sanction the exercise of local sovereignty" in the "'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'" *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)). If "any ... possible construction" avoids violating the law of nations, *Charming Betsy*, 6 U.S. (2 Cranch) at 118, then that construction must control. If the statute is "ambiguous," then the ambiguity must be resolved in a way that "avoid[s] unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. Even a "more natural reading of the statutory language" must be disregarded to avoid such interference, so long as the text is not so conclusive that "we *must* accept that reading." *Id.* at 174 (emphasis in original).

Any argument that the statute should be given more expansive reach must thus "be directed to the Congress rather than to us," because it is Congress that "'alone has the facilities necessary to make ... important policy decision[s]'" that could affect relations abroad. *McCulloch*, 372 U.S. at 22 (quoting *Benz*, 353 U.S. at 147).

B. International conflicts rules prevailing in 1934 required that securities fraud claims be decided by the law of the nation where the transaction occurred.

The presumption that Congress, when it legislated, intended to embrace international choice-of-law principles raises the question of what those principles were when Congress legislated. For the Securities Exchange Act of 1934, the question becomes: what

were the relevant "areas and transactions in which American law would be considered operative under prevalent doctrines of international law" in 1934? *Lauritzen*, 345 U.S. at 577. Whatever the prevalent doctrine was, the "choice-of-law principles" it reflects must be "assumed to be incorporated" into the Exchange Act. *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting).

The answer here is *lex loci delicti*. The "common-law roots of the securities fraud action" under Section 10(b) may be found in "common-law tort actions for deceit and misrepresentation." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341, 345 (2005). And "[w]hen [the Exchange Act] was passed, the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*." *Sosa v. Alvarez-Machain*, 542 U.S. at 705 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377, 379 (1934)). The law applicable to torts was "the local law of the 'place of wrong,'" which "was described ... as 'the state where the last event necessary to make an actor liable for an alleged tort takes place.'" *Sosa*, 542 U.S. at 705-06 n.3 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS 412 (1969)).

These rules were embodied in the 1934 *Restatement (First) of Conflict of Laws*, which, as petitioners note, was issued "[r]oughly contemporaneously with the passage of the Exchange Act." Pet. Br. 28 n.14. The first Restatement's treatment of torts was utterly uncontroversial at the time, as there was "*zero*" debate over the "all-important *lex loci delicti* rule for torts."[20] The principle was this:

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[20] Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad As Its Reputation?*, 32 S. ILL. U.L.J. 39, 70 (2007) (emphasis in original).

§ 377. THE PLACE OF WRONG.

The place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place.

RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (emphasis in original). The "law of the place of wrong determines whether a person has sustained a legal injury," *id.* § 378, and, with almost no exceptions, "whether a person is responsible for harm he has caused," *id.* § 379.

For a fraud resulting in a transaction on a foreign securities exchange, the last event necessary to create liability is the execution of the transaction on that foreign exchange—meaning that the foreign country's law would apply. A note to Section 377 confirms that point—

> 4. When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made.

Id. § 377 note 4, at 457 (emphasis omitted)—as does an illustration to the note:

> 6. A, in state X, owns shares in the M company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares falls. The place of the wrong is X.

Id. § 377 illustration 6, at 457.[21]

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[21] Petitioners cite drafts of other sections for the proposition that "'each state in which any event in [a] series of acts and consequences occurs may apply its law to the event.'" Pet. Br. 28 n.14; *see* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 65, 66. These sections do not set forth conflicts rules, but rather the underlying principles of "legislative jurisdiction" that *result* in the "[c]reation of [a] choice of law problem" when it "happen[s]

That is the choice-of-law rule that Congress must be presumed to have incorporated into the Exchange Act. And it is fatal to the Australian petitioners' claims, because it establishes that the place of wrong is *where the securities transaction occurred*, as that is where the "last event necessary" to produce liability takes place. Petitioners point to nothing in the Exchange Act—let alone an "affirmative intention ... clearly expressed," *Benz*, 353 U.S. at 147—suggesting that Congress intended otherwise.

C. The Australian petitioners' claims fail under *Empagran*.

Even if the 1934 Act is construed in light of conflicts principles more modern than the statute itself, the Australian petitioners' claims still fail. For this case is the securities-law analog of *F. Hoffmann-La Roche v. Empagran*. That case, of course, upheld the dismissal of what essentially was a foreign-cubed antitrust case—a case involving foreign plaintiffs, foreign defendants, and foreign purchases and damages. 542 U.S. at 159-60. It even involved allegations of material domestic conduct and parallel domestic injury suffered by Americans: the foreign plaintiffs had complained of a global conspiracy, one in which "some of the anticompetitive price-fixing conduct alleged here took place in *America*," and they

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that more than one state has legislative jurisdiction." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 65 cmt. b, at 98. When such a conflict arises, a court must then "select the law of one of the ... states" by resorting to the choice-of-law principles "stated in Chapter 9"—including Sections 377-79. *Ibid.*; *see also Hartford Fire*, 509 U.S. at 813-14 (distinguishing between scope of "legislative jurisdiction" and "whether and to what extent Congress *has* exercised [its] legislative jurisdiction"; emphasis in original).

alleged that this global conspiracy had led to higher prices both "in the United States" and abroad, thus harming both domestic and foreign purchasers. *Id.* at 159, 165 (emphasis in original).

Indeed, the *Empagran* plaintiffs' case for extraterritorial reach was much stronger than the petitioners' case is here. Not only did the *Empagran* plaintiffs not have to contend with the presumption against extraterritoriality, *see id.* at 165; *Hartford Fire*, 509 U.S. at 796, and not only did they invoke an express private right, but they also invoked a statute that explicitly provided for *some* degree of extraterritorial application, *see* 542 U.S. at 162; 15 U.S.C. § 6a. What is more, the Court even noted that the *Empagran* plaintiffs' reading of the Foreign Trade Antitrust Improvements Act—under which they could sue on the basis of domestic effects that had "'give[n] rise'" to Sherman Act claims of others, namely American purchasers—was arguably "the *more natural reading* of the statutory language." 542 U.S. at 174 (emphasis added; quoting 15 U.S.C. § 6a(2)).

Yet the Court rejected that "more natural" reading of the statute—in favor of a construction that allowed claims to be brought *only* by "purchaser[s] in the United States ... based on domestic injury." *Id.* at 159. The Court held that while it was "reasonable, and hence consistent with principles of prescriptive comity," to apply the Sherman Act "to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused," it was unreasonable "to apply those laws to *foreign* conduct insofar as that conduct causes independent *foreign* harm and that *foreign* harm alone gives rise to the plaintiff's claim." *Id.* at 165 (emphasis added and omitted). Application of American law would create "a serious risk of inter-

ference with a foreign nation's ability independently to regulate its own commercial affairs," the Court explained, and insofar as foreign harm was at issue, "the justification for that interference seems insubstantial"—and hence unreasonable. *Ibid.*

Precisely this reasoning applies here. What the Australian petitioners seek is to impose upon an Australian corporation massive liability under United States law for harm suffered *in Australia* as the result of conduct and transactions regulated extensively by *Australian law*: disclosures issued and disseminated *in Australia*, and share purchases on an *Australian* exchange. In seeking such relief from a United States court, moreover, the Australian petitioners seek to evade the ample remedial procedures that their own country has provided to redress harms of the sort of which they complain.

It is no answer to contend, as petitioners do, that "the potential for conflict between 'the anti-fraud sections of the securities laws' and foreign laws is minimal, because 'anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged.'" Pet. Br. 35 (quoting Pet. App. 17a). *Empagran* rejected this very argument: that because "many nations have adopted antitrust laws similar to our own, ... the practical likelihood of interference with the relevant interests of other nations is minimal." 542 U.S. at 167. The Court responded that despite similarities in some substantive policies, there were still notable differences in others. *See ibid.* Equally important, it observed that "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Ibid.* And "to apply our remedies would

unjustifiably permit [foreign] citizens to bypass their own [countries'] less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Ibid.*

Here, the "risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," *id.* at 165, is equally manifest. The design of a securities regulation and enforcement system poses a plethora of policy questions—difficult questions about which nations can and do disagree. Indeed, in the United States, as this Court is well aware, many of these questions have inspired decades of spirited debate among legislators, regulators, judges, academics, investors, and issuers. What are the duties of disclosure? What information is material? Should forward-looking statements be allowed, and, if so, with what restrictions or protections? How is fraud to be redressed? Should public enforcement be supplemented with private lawsuits at all? If so, what are the elements of a claim? What state of mind is required to establish liability? Must a plaintiff show reliance? If so, how? Should a "fraud-on-the-market" presumption of reliance be recognized?

The questions go on: Should there be issuer liability for secondary trading at all—that is, should an issuer, and by extension its current shareholders, pay damages for losses suffered by shareholders who did not buy their shares from the company, but from other shareholders on the open market? What is the test for causation? How are damages measured? Should there be a cap on class damages? Should there be a "lookback" limit on recoverable losses, limiting damages on the basis of an upswing in a security's price after it drops? Who can be sued?

Control persons? Secondary actors? Should class actions be allowed? Opt-out? Or opt-in? Should losers pay the winners' attorneys' fees? Should contingency fees be allowed? These are just some of the questions that arise.

Other sovereign nations should be free to decide—and have decided—these questions for themselves, and not necessarily the way the United States has decided them. In fact, the availability of private remedies for alleged securities fraud "differs considerably from jurisdiction to jurisdiction,"[22] with the United States being "the easiest place in the world for investors to recover damages caused by fraud."[23] For example, "Australia and Canada have been the most accommodating countries to securities class actions outside the United States,"[24] but even their systems differ materially from ours. Australia allows private, opt-out securities class actions; but it does not recognize the fraud-on-the-market presumption, does not allow contingency fees, and follows the English rule on attorneys' fees.[25] In Canada, the law of Ontario permits opt-out class actions, dispenses

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[22] REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION OF THE INTERNATIONAL BAR ASSOCIATION 288 (2008), *available at* http://tinyurl.com/taskforce-etj-pdf.

[23] Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121, 1129 (2007).

[24] *Id.* at 1142.

[25] *See, e.g.*, Paul von Nessen, *Australian Shareholders Rejoice: Current Developments in Australian Corporate Litigation*, 31 HASTINGS INT'L & COMP. L. REV. 647, 663-68, 683 (2008); Thompson, 41 INT'L LAW. at 1142; Michael Duffy, *"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 MELB. U.L. REV. 621, 645-50, 655, 664 (2005).

with any scienter requirement, and recognizes a presumption that obviates proof of individual reliance. The catch: class damages are stringently capped—at the greater of CDN$1 million, or five percent of the issuer's market capitalization. And Canada too follows the English rule.[26]

Other nations have taken far more restrictive approaches. Most notably, many countries object to what they perceive to be the abuses of American class actions.[27] As a result, in their own systems, they have either declined to allow mass litigation of claims, or have developed alternatives to the class action. For example, Germany has adopted a "model case" securities litigation system specifically designed to avoid the perceived ills of the American class action.[28] The Netherlands does not allow litigation of class claims, but passed a law allowing class *settlements*, a law that was used to effectively preempt at least one

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[26] *See, e.g.*, Thompson, 41 INT'L LAW. at 1142-43; Ontario Securities Act, R.S.O., ch. S.5 §§ 138.1, 138.7 (1990, as amended).

[27] *See, e.g.*, Edward F. Sherman, *Group Litigation Under Foreign Legal Systems*, 52 DEPAUL L. REV. 401, 403 (2002); Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 343, 346-47 (2001); Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants To Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1579-1580 (2005).

[28] *See, e.g.*, German Ministry of Justice, The German "Capital Markets Model Case Act," *available at* http://bit.ly/KapMuG; *see also* Mark C. Hilgard & Jan Kraayvanger, *Class actions and mass actions in Germany*, LEGAL PRACTICE DIV. LITIG. COMM. NEWSLETTER (Int'l Bar Ass'n, London), Sept. 2007, at 40, *available at* http:// bit.ly/KapMuG2.

major f-cubed securities class action in the United States.[29]

And some foreign nations are so hostile to American opt-out class actions that they deny preclusive effect to judgments and settlements in those actions.[30] This hostility, indeed, has even raised the specter of outright judicial conflict: in one recent case involving a French company, lawsuits were brought in France to enjoin French investors from participating as named plaintiffs in the American action, as well as to enjoin the dissemination of class notice in France; and a United States district judge was, in turn, asked to enjoin the French actions.[31] This sort of conflict is the inevitable result of "permitting [foreign] citizens to bypass their own [countries'] less generous remedial schemes" in favor of litigation under Section 10(b). *Empagran*, 542 U.S. at 167; *cf. Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950, 953 (1st Cir. 1991) (Breyer, C.J.) ("international forum-shopping" in securities cases "increase[s] the likelihood that decisions made in one country will cause ... adverse effects in another").

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[29] *See, e.g.*, Michael D. Goldhaber, *Shell Games: Amsterdam Could Become the Class Action Capital of Europe if the U.S. Declines the Honor*, AM. LAW., Dec. 2007, *available at* 12/2007 Am. Law. S22 (Westlaw); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 714 (D.N.J. 2007).

[30] *See, e.g.*, Buschkin, 90 CORNELL L. REV. at 1579; *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 282-87 (S.D.N.Y. 2008); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 103-05 (S.D.N.Y. 2007).

[31] *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH), 2009 WL 3859066, at *1 & n.2 (S.D.N.Y. Nov. 19, 2009).

Finally, there is no merit to the suggestion made by *amici*—but not petitioners—that global, foreign-cubed securities class actions should be allowed whenever a foreign issuer has issued ADRs and made SEC filings in connection with those ADRs. MN Servs. Br. 4-5; Alecta Br. 25. This argument, which has consistently failed even under the generous conduct and effects tests,[32] cannot be reconciled with *Empagran*. For there the Court—despite a plausible textual argument—refused to construe the FTAIA to allow foreign vitamin purchasers similarly to piggy-back their claims onto those of Americans who purchased in the United States. Here, as in *Empagran*, the "foreign conduct [has allegedly] cause[d] independent foreign harm and that foreign harm alone gives rise to the [foreign] plaintiff's claim." 542 U.S. at 165 (emphasis omitted). The fact that there were ADR holders and SEC filings, at most, supports a right of action in favor of the ADR holders, who purchased their shares in the United States. It does not support the extension of the Section 10(b) inferred right to transactions that occurred abroad.[33]

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[32] *See, e.g., In re Novagold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 306 (S.D.N.Y. 2009) (SEC filings insufficient to support claims of foreign plaintiffs); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 568 (S.D.N.Y. 2008) (same); *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002) (foreign plaintiffs may not "bootstrap their losses to [the] independent American losses" of ADR holders).

[33] The *Restatement (Third) of Foreign Relations Law of the United States*, upon which petitioners rely (Br. 27-28), does not help petitioners. It does not purport to apply anything Congress enacted. In any event, its version of the conduct test requires a showing of "conduct occurring *predominantly* in the United States that is related to a [foreign] transaction in securities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416(1)(d) (1987) (emphasis added). Moreover,

In short, given that "'litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general,'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)), it is hardly surprising that its principal features "could not win their own way in the international marketplace for [policy] ideas," *Empagran*, 542 U.S. at 169. To nonetheless impose that system on the world through foreign-cubed litigation would constitute "an act of legal imperialism" of precisely the sort that the Court "must assume" Congress did not intend to commit. *Ibid.*

III. THE PURCHASER-SELLER REQUIREMENT OF THE JUDICIALLY CREATED SECTION 10(b) PRIVATE RIGHT SHOULD BE CONSTRUED TO REQUIRE PLAINTIFFS TO HAVE PURCHASED OR SOLD SECURITIES IN THE UNITED STATES.

A. There is one additional reason why the Australian petitioners' claims must fail—an even more fundamental one. Not only is Section 10(b) "silent on the issue of extraterritorial application," Pet. 16; *accord* Pet. App. 7a, but it also may be said to be *doubly* silent. For "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes," *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008), and this Court has "made no

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the Restatement forecloses the exercise of jurisdiction to prescribe when that would be "unreasonable," in light of, among other things, "the extent to which another state may have an interest in regulating the activity." *Id.* § 403(1), (2), (2)(g); *cf. Empagran*, 542 U.S. at 164-65.

pretense that it was Congress's design to provide the remedy afforded," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991).

The Section 10(b) private right is thus, in reality, vestigial. Federal judges created it under an "*ancien regime*" of law "that held sway [over] 40 years ago," a regime under which they indulged "the habit of venturing beyond Congress's intent" to invent unexpressed rights of action in order to better effectuate, in their own policy calculations, "'the congressional purpose' expressed by a statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). But this Court has long since "abandoned that understanding" and "sworn off [that] habit," "ha[s] not returned to it since," and has repeatedly refused to accept "invitation[s] to have one last drink." *Id.* "Statutory intent" to create a private right is "determinative." *Id.* at 286. Accordingly, any doubt about the general scope of the Section 10(b) private right must now be resolved "against its expansion," and any "decision to extend the cause of action" must be left "for Congress." *Stoneridge*, 552 U.S. at 165; *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Blue Chip Stamps*, 421 U.S. at 737.

For similar reasons, the Court has also consistently found it proper to consider "[t]he practical consequences of an expansion" of the Section 10(b) private right. *Stoneridge*, 552 U.S. at 163; *see also Cent. Bank*, 511 U.S. at 189; *Va. Bankshares*, 501 U.S. at 1105; *Blue Chip Stamps*, 421 U.S. at 723. In *Blue Chip Stamps*, for example, to minimize the "ill effects" of potentially abusive litigation under Section 10(b), the Court "[c]abin[ed] the private cause of

action by means of the purchaser-seller limitation," by which "'the plaintiff class for purposes of § 10(b) and Rule 10b-5 private damages actions is limited to purchasers and sellers'" of securities. *Dabit*, 547 U.S. at 80-81 (quoting *Blue Chip Stamps*, 421 U.S. at 731-32).

The practical considerations in favor of cabining the Section 10(b) private right here are far more compelling. For at issue in this case is not simply whether economic costs should be inflicted on domestic, or even foreign, parties, but whether a price should be exacted from foreign *nations* in the form of their sovereignty—damage that, for more than two centuries, this Court has said must not be inflicted by an American statute unless no "other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

B. The fact that there is no textual basis for the Section 10(b) private right thus reinforces the application of the canons of construction that control here. If the text of a right of action that Congress expressly created must be construed to avoid harm to foreign sovereignty, *e.g.*, *Microsoft*, 550 U.S. at 454-55; *Empagran*, 542 U.S. at 155, then it is all the more imperative so to construe the judicial formulation of a right that Congress did not create. That may be done through the straightforward application of the presumption against extraterritoriality, or of the *Charming Betsy* rule—both of which make it impossible to say that purchasers on foreign exchanges are part of "'the class for whose *especial* benefit the statute was enacted.'" *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citation omitted; emphasis in original).

The Section 10(b) private right may also be confined to its proper domestic scope merely by applying an

"ordinary assumption" that applies to legislation generally—namely, that words in "domestically oriented statutes" refer to people, things, and events in the United States. *Small v. United States*, 544 U.S. 385, 390 (2005). That assumption applies even when the presumption against extraterritoriality does not, and rests upon the "'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.* at 388 (quoting *Smith*, 507 U.S. at 204 n.5). The Court "consequently assume[s] a congressional intent that [a] phrase" in a law's text "applies domestically, not extraterritorially." *Id.* at 390-91.

If this ordinary assumption applies to statutory text, it should apply equally as well to the judicially prescribed elements of an inferred right of action. Doing that here provides a straightforward answer to the question presented in this case—and would fully conform the Section 10(b) inferred right to the extraterritoriality canon and the *Charming Betsy* rule. Thus, at the very least, the *Blue Chip Stamps* purchaser-seller rule (*see* pp. 53-54, *supra*)—a rule established so that Section 10(b) would not "provide a cause of action ... to the world at large," 421 U.S. at 733 n.5—should be understood to limit standing to investors who purchased and sold securities *in the United States*. The fact that the Australian petitioners indisputably did not do so provides yet another reason why they have not stated a claim for relief under Section 10(b).

* * *

To paraphrase a question this Court asked in *Empagran*:

> *Why should American law supplant Australia's own determination about how best to protect*

Australian investors from allegedly fraudulent conduct engaged in significant part by an Australian company?

Cf. 542 U.S. at 165. The answer, as in *Empagran*, is that there is "no good answer to the question." *Id.* at 166.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

I. THERE IS NO STATUTORY BASIS FOR NOT APPLYING AMERICAN LAW TO FRAUDULENT CONDUCT CARRIED OUT IN THE UNITED STATES

The Second Circuit affirmed the dismissal of this action for lack of subject matter jurisdiction. Clearly that ruling cannot stand and no party appears before the Court to defend the jurisdictional ruling.[1]

Before the Court now is a question whether American securities fraud law applies when the predicate conduct occurs in the United States, but the fraud then has extraterritorial effects. On the critical issue of the reach of the Exchange Act, Petitioners and the Solicitor General assert that it simply defies logic and any form of statutory construction to hold that substantial and material activity in the United States is somehow insulated from American law merely because there are foreign effects. Under that framework, the differences between Petitioners and the Solicitor General are reduced to narrow questions of enforcement by private parties and the corresponding burden of pleading by private parties – as will be addressed below.

By contrast, Respondents, and every *amicus* supporting Respondents, start from the proposition that

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[1] The issue of potentially vacating the opinion below and remanding to the Second Circuit in light of intervening authority from decisions of the Court has been separately presented to the Court and will not be repeated here.

the Court should take this case as an opportunity to rewrite the Exchange Act to limit the reach of American securities laws only to transactions conducted on an American exchange. In order to sell this radical recasting of American law, Respondents attempt to portray this as a case exclusively about fraudulent conduct in Australia. If that were the case – that is, an Australian plaintiff who purchased stock of an Australian company on an Australian exchange and that company had committed securities fraud in Australia – there would indeed be no jurisdiction because none of the statutory requirements of the Exchange Act would be met.

However, as amply alleged in the pleadings below, this case reads like a guided itinerary through the investment calamities that beset the American economy. The predicate act was mortgage fraud in Florida carried out through a portfolio of two million American mortgages. JA 39a.[2] As part of the fraud, further conduct occurred *in the United States* through multi-billion dollar hedging activity at NAB's trading operation in New York City. In New York, that hedging resulted in losses of $1.4 billion in 1999, all of which was conducted through an American company owned by an Australian bank, with American and Australian executives running the fraudulent show from the United States.

Once past the improper dismissal for lack of subject matter jurisdiction, the primary question before the Court

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[2] Petitioners adopt herein the abbreviations defined in Brief For Petitioners ("Pet. Br.") at footnote 1.

is then whether fraudulent conduct carried out in Florida, which used the U.S. mails and involved U.S. commerce, is actionable under the plain language of the Exchange Act. No statutory construction would permit conduct centrally carried out in the United States, continually and openly using interstate commerce and the U.S. mails, to be free from American legal scrutiny so long as the conduct had some effect outside the United States.

As the Solicitor General points out, Section 10(b) should apply here given that significant and material securities fraud occurred in the United States. SG Br. 13-25. That test underscores the critical importance of American securities laws having full force in the United States, lest this country truly become a "'Barbary Coast,' as it were, harboring international security 'pirates,'" *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977), who use this country "as a base for manufacturing fraudulent security devices for export." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, J.).

At the heart of Respondents' argument, supported by a bevy of *amici*, is the curious claim that American laws cannot be presumed to reach conduct in the U.S., if the conduct also has international effects. Thus, Respondents propose a rule of statutory construction that would reject the plain language of the Exchange Act in favor of a requirement that Congress, each time it enacts a statute, reaffirm that American laws apply any time there is a potential extraterritorial impact (Resp. Br. 52-56). Otherwise, according to the Respondents, application of U.S. law would apparently damage the sovereignty of

other nations. *Id.* at 54. As well argued by the Government, this position cannot be reconciled with U.S. sovereign interests in controlling financial misbehavior in this country. As long recognized in the Restatement (Second) of Foreign Relations Law, "A state has jurisdiction to prescribe a rule of law[:] (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory . . ." Restatement (Second) of Foreign Relations Law § 17 (1962). *See also* Restatement (First) of Conflict of Laws §377 cmt. a ("both the state in which the actor acts and the state in which the legal consequences of his act occur have legislative jurisdiction [when exercised] to impose an obligation to pay for harm caused thereby").

Given the broad language of the Exchange Act, the issue in transnational securities fraud conduct is whether there is some other overriding limitation on the application of American law. As set forth by Justice Scalia in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993), the Court should follow the test set out in the Restatement (Third) of Foreign Relations: "Under the Restatement, a nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connection within another state when

the exercise of such jurisdiction is unreasonable.' Restatement (Third) § 403(1)." *Id.* at 818.[3]

The reasonableness inquiry, in turn, looks to a number of factors set forth in the Restatement that examine the interests of various nations in the conduct in question, including, for example: "the extent to which the activity takes place within the territory [of the regulating state] . . . ." Restatement (Third) of Foreign Relations § 403(2)(a).[4] These factors clearly favor application of United States law. The activity relevant to the claims here took place primarily in Florida, and Respondents primarily are U.S. nationals, with only two of the six Respondents having their principal place of business or residence outside the United States. In addition, the

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[3] This is sometimes referred to as "a question which touche[s] the comity of nations, and . . . the comity is, and ever must be, uncertain. . . . [I]t must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule." Joseph Story, Commentaries on the Conflict of Laws 28 (1895).

[4] The causation resulting from defendants' conduct in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (Resp. Br. 37), has nothing in common with the effect of the fraud by HomeSide. The conduct of the *Hemi Group* defendants did not directly cause the loss because "the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 990 (emphasis in original). For a similar reason, *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008) (Resp. Br. 38), has no relevance here. In *Pugh*, plaintiffs were investors in a newspaper, and defendant's scheme directly defrauded only the newspaper's advertisers, not its shareholders; defendants "were not alleged to have participated in preparation of any of the challenged statements" made to the shareholders. *Id.* at 690, 696.

economic activity of NAB alone or with HomeSide is domestic: ownership of a substantial bank in Michigan, a multi-billion dollar trading operation in New York City tied in part to the HomeSide portfolio of mortgages on over two million American homes, and operating profits of all U.S. entities of $490 million in 2000. *See* § 403(2)(b) (considerations of interjurisdictional efficiency would point to the U.S. as the locus of most of the factual information germane to this case). Accordingly, the exercise of jurisdiction here is reasonable under the Restatement factors. *See* § 403(2)(a), (b), (g) and (h).

II. RESPONDENTS ERRONEOUSLY RELY ON CASES IN WHICH THE ENTIRETY OF THE WRONGFUL CONDUCT OCCURRED ABROAD AND DID NOT INVOLVE DOMESTIC MISCONDUCT

The difference between conduct in the United States and acts unrelated to American activity is key to the disposition of this case and to the line of cases from the Court addressing the extraterritorial application of American law. Respondents and *amici* repeatedly rely on cases that involve conduct undertaken exclusively abroad to argue that the application of Section 10(b) to transnational securities fraud should be narrowly construed because Congressional legislation, "unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted).

The Solicitor General correctly points out the errors of this argument. SG Br. 22-25. First, the presumption set forth in *Aramco* does not preclude application of Section 10(b) to securities fraud that involves significant and material conduct in the United States. As set forth by the Solicitor General: "Applying Section 10(b) to those frauds is not accurately viewed as extraterritorial because it involves regulation of essentially domestic conduct." SG Br. 22. In *Aramco*, none of the critical employment decisions occurred in the U.S.: not the hiring; not the claimed discrimination; and not the basis for the claimed damages.

Second, the Solicitor General correctly notes that "application of the substantive prohibitions of the United States securities laws to transnational frauds with a significant domestic component generally has not resulted in international conflict." SG Br. 23.

Third, none of the cases cited by Respondents and *amici* in support of the presumption against extraterritorial application of U.S. laws involved significant conduct in the United States material to the alleged violations. *See Aramco*, 499 U.S. at 247 (underlying Title VII discrimination conduct occurred in Saudi Arabia); *Foley Bros. v. Filardo*, 336 U.S. 281, 283 (1949) (underlying violation of Eight Hour Law occurred in Iraq and Iran); *New York Cent. R.R. v. Chisolm*, 268 U.S. 29, 30 (1925) (claim under Federal Employer's Liability Act based on negligent conduct in Canada); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch)

64, 65-67 (1804) (seizure in the Caribbean of a Danish ship).

Indeed, despite Respondents' infatuation with *Charming Betsy,* the case is highly instructive as a maritime dispute over conduct that had nothing to do with the United States. The issue in *Charming Betsy* was whether an early American statute prohibiting trading with enemy aliens supported the seizure of a Danish vessel. The ship was seized outside the United States and the sole connections to the U.S. were that the vessel had once been registered as American, but had been sold by the time of its commerce with France, and that the individual who bought the ship happened to have been born in the United States, though he had moved to St. Thomas as an infant, became a Danish subject, and registered the vessel as Danish. Chief Justice Marshall ruled that the United States statute did not apply, as it would have violated international norms of salvage and prize and run the risk of conflict with a neutral state, Denmark. 6 U.S. at 68-69.

Thus, in *Charming Betsy*, the conduct at issue had nothing to do with the United States, was subject to a well-developed regime of maritime law, and the potential interference with the sovereignty of the seized ship's nation (Denmark) was patent. By contrast, the instant case concerns the application of American law to conduct undertaken in the U.S. – the precise question whose absence was central to this Court's ruling in *Charming Betsy*.

In a similar vein, Respondents and many of the *amici* rely heavily on *F. Hoffman LaRoche v. Empagran S.A.*, 542 U.S. 155 (2004), for the proposition that American laws should presumptively not have extraterritorial effects. But the key to *Empagran*, as with *Charming Betsy*, is the absence of a nexus between the asserted harm and any effect on the United States. In *Empagran*, the Court made the distinction clear by asking the following: "But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*" 542 U.S. at 165 (emphasis in original).[5]

By contrast, the present case begins with fraud committed in the United States, both in Florida and in New York, and carried forth through the instrumentalities of U.S. interstate commerce and the U.S. mails. For as much as Respondents and *amici* attempt to dress this case up as a global reach by American law (*see, e.g.*, Resp. Br.

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[5] Similarly, in *New York Cent. R.. R. Co. v. Chisolm*, 268 U.S. 28 (1925), plaintiff failed to allege any wrongful conduct within the United States. A claim was made under American railway law against an American employer for a death caused in a railroad accident occurring 30 miles north of the U.S.-Canadian border. The Court noted that "[l]egislation is presumptively territorial", *id.* at 32, in holding that the plaintiff could bring an action in the United States but that "[t]he carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the act of negligence occurred [Canada]. . ." *Id.* Thus, the Court held that Canadian substantive law should have been applied by the district court.

2 (using the term Australia or Australian 16 times in one page alone)), saying so does not make it so. Counter to the drum beat of the repeated invocation of foreign or Australian or "f-cubed" or any other such term, the legal question before the Court is the application of American securities laws to conduct undertaken in the U.S. This is the traditional concept of the exercise of jurisdictional sovereignty over a nation's territory that is not only well established in this country, but is the sovereign prerogative of every nation.[6]

Respondents then attempt to describe *Microsoft v. AT&T*, 550 U.S. 437 (2007), as "the most analogous case." Resp. Br. 34. But, again, there simply was no domestic conduct in *Microsoft* that was actionable under the statute. *Id.* at 455. Moreover, to the extent that the Court relied on the presumption against extraterritoriality when interpreting what kind of conduct could violate the Patent Act, such reliance was justified by the fact, *not present here*, that explicit language in the Patent Act supports "a general rule that our patent law does not apply extraterritorially." *Id.* at 442, 455 ("The traditional understanding that our patent law 'operate[s] only domestically and d[oes] not extend to foreign activities' (citations omitted) is embedded in the patent Act itself.").

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[6] The Australian Securities and Investments Commission, in its *amicus* brief, sets forth the Australian regulatory scheme but: (1) has not identified any conflict with the U.S. securities regulatory scheme in this case; and (2) by its own admission did not investigate these claims of fraudulent activity or take any action. *See* Brief Of The Government Of The Commonwealth Of Australia As *Amicus Curiae* In Support Of Defendants-Appellees 14-15.

Respondents also argue that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), involved proximate cause and, because the tort claim in that case "arose" overseas, Petitioners' claims here are not actionable. Resp. Br. 39. However, the Court in *Sosa* relied on the specific statutory provisions of the Federal Tort Claims Act, which "was designed primarily to remove the sovereign immunity of the United States from suits in tort," and which, in order to protect the United States, *made a specific exception for "[a]ny claim arising in a foreign country."* 542 U.S. at 700, 705 (emphasis added). Therefore, *Sosa* involved specific statutory interpretation like *Empagran* or *Microsoft*, and Respondents have identified no comparable language under the Exchange Act – nor could they.

III. THE EXCHANGE ACT AND EACH OF ITS TERMS IS A PROPER EXERCISE OF CONGRESSIONAL POWER

A. The Government's Proposed "Significant And Material" Test Is A Proper Check On The Exercise Of Legislative Jurisdiction

The Solicitor General has proposed that for Section 10(b) to apply the test is whether "significant and material" conduct has occurred in the United States. SG Br. 16. Applying this standard to Petitioners' claims, the Solicitor General found that:

> Petitioners stated a violation of Section 10(b) because they alleged that significant conduct material to the fraud occurred in the United States. According to their

> complaint, the false information that NAB released to the public in Australia was generated by HomeSide and its officers in the United States with the expectation that it would be incorporated into NAB's financial statements. The conduct within the United States thus was not peripheral or merely preparatory but was integral to the overall fraud.

SG Br. 30-31 (citation omitted).

By contrast, Respondents and many of the *amici* argue that the Court should in effect disregard the statutory language and limit the Section 10(b) private right of action only to persons who purchased or sold securities in the United States. Their test is as follows:

> The Court should accordingly limit the Section 10(b) inferred right to persons who purchased or sold securities in the United States.

Resp. Br. 21.

Respondents cannot escape the language of the Exchange Act, which is more expansive in its scope. Initially, the preamble to the Exchange Act sets forth the Act's purpose: "To provide for the regulation of securities exchanges . . . operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges . . . ." 48 Stat. 881 (1934).

Further, as to the scope of the conduct proscribed, Section 10(b) of the Act, 15 U.S.C. § 78j, prohibits "any person" from employing, even indirectly, "any means of instrumentality of interstate commerce" in contravention of rules against "manipulative and deceptive" devices prescribed by the SEC consistent with Section 10(b). "Interstate commerce", in turn, is defined by the Exchange Act to include "trade, commerce, transportation, or communication . . . between any foreign country and any state . . . ." 15 U.S.C. § 78c(a)(17) (emphasis added).

Applied to this case, Petitioners brought suit under the Exchange Act against HomeSide and NAB, who operated using "the means and instrumentalities of interstate commerce, including . . . the United States mails . . ." to effectuate the massive accounting fraud. PA 40a. That is consistent with the provisions of the Exchange Act and its stated objectives.[7]

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[7] "In construing a statute, we are obligated to give, if possible, effect to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). *See also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

B. The Solicitor General's Test And *Forum Non Conveniens* Jointly Act To Exclude Cases With Insufficient Nexus To United States Territory

The application of the Exchange Act to transnational securities fraud cases that have "substantial and material" conduct in the United States would not result in the indiscriminate adjudication of such cases in federal courts. Cases having *de minimis* contact with the United States, or cases that truly encroach upon a foreign nation's primary interest in the underlying conduct, are properly weeded out by early determinations of personal jurisdiction or *forum non conveniens*, what the Court has deemed a "less burdensome course." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007). As the Court noted in *Sinochem*:

> a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.

Id. at 425.

If the plaintiff's choice of forum is not supported by a "bona fide connection with the United States," dismissal

will ensue. Thus, if the plaintiff is a foreign securities purchaser, *Sinochem* makes clear that *forum non conveniens* may dictate dismissal of an action brought in the U.S.: "[W]hen the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor 'applies with less force for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" 549 U.S. at 430 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)). Similarly, "a court can readily determine that it lacks [personal] jurisdiction over the cause or the defendant," *Sinochem,* 549 U.S. at 436, and dismiss for lack of case specific personal jurisdiction – as opposed to the improper use of the non-case specific doctrine of subject matter jurisdiction.

IV. THE SOLICITOR GENERAL'S EFFORTS TO DISTINGUISH CLAIMS BROUGHT BY PRIVATE PARTIES AND THE SEC CANNOT BE RECONCILED WITH THE CONTROLLING STATUTES

A. The Government's "Direct Cause" Test, Properly Applied, Provides A Basis For Recovery

Despite rejecting every aspect of the Second Circuit's legal analysis, the Solicitor General nonetheless argues for affirmance on the basis of a distinct burden to be borne by private litigants under the Exchange Act. The Government argues that a "direct-injury" requirement applies to private plaintiffs but not the SEC. SG Br. 28-30. The Government asserts that "every court of appeals that had addressed the transnational application of Section 10(b) before enactment of the [Private Securities

Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) ("PSLRA")] had held that a plaintiff must establish that conduct within the United States 'directly caused' his injury." SG Br. 28-29. The significance of this argument is not apparent. To begin with, the cases cited by the Solicitor General all involved tests for finding jurisdiction, not tests for whether plaintiffs stated a cause of action. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) ("directly caused" element dismissed in context of "test for finding jurisdiction"); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041 (2d Cir. 1983) ("directly caused" element discussed in context of whether district court has "jurisdiction over suits by foreigners who have lost money through sales abroad"); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (1983) ("directly caused" element discussed in context of the court formulating "a test for subject matter jurisdiction"); *Continental Grain (Aust.) Pty. Ltd. v. Pacific Oil Seeds, Inc.*, 592 F.2d 409, 420 (8th Cir. 1979) ("directly caused" element discussed in terms of "finding subject matter jurisdiction").

The Solicitor General fails to note that the same pre-PSLRA cases defining the direct causation element for determining subject matter jurisdiction also held the SEC and a private plaintiff to the same standards. *Kasser*, 548 F.2d at 115 (applying "directly caused" element to determine jurisdiction over SEC action for injunctive relief). Accordingly, courts did not distinguish between the SEC and private litigants in applying direct cause in transnational fraud cases.

More significantly, it is unclear what would be deficient about the pleadings in this case under such a direct causation standard. The allegations concern coordinated conduct in the United States, undertaken by officers of HomeSide and NAB to inflate the book value of NAB. In its primary cases on causation, most notably the decision this Term in *Hemi*, the Court sets out the common-law foundations of proximate cause as turning on "'some direct relation between the injury asserted and the injurious conduct alleged' . . . A link that is 'too remote,' 'purely contingent' or 'indirec[t]' is insufficient." *Id.* at 989 (quoting *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 271, 274 (1992)). When the Court has found the casual link to be broken, it has relied on intervening actions unrelated to the complained of conduct, and carried out by independent actors. Thus, in *Hemi*, the Court found that there could be no liability because "the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*." *Id.* at 990 (emphasis in original). *See also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)(tax fraud directed at public authorities that allowed lower price margins cannot be the predicate for harm suffered by a business competitor's loss of revenue).

B. Congress Created An Express Right Of Action With The PSLRA And Did Not Limit The Reach Of Private Suits By Foreign Plaintiffs Against "Substantial And Material" Fraud Committed In The United States

Alternatively, the Solicitor General argues that this private right of action should be limited to allow only the SEC, and not private plaintiffs, to prosecute violations of Section 10(b) like those alleged here.[8] This argument, however, fails to account for the PSLRA, as recognized by this Court in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 155 (2008). As this Court has held, "[t]he [PSLRA's] express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 163. Moreover, the policy reasons, if any, for drawing such a distinction in certain contexts under certain other statutes are absent here.

This Court has held that the PSLRA was intended to have "Congress . . . reassert its authority in this area," and

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[8] In the Government's opposition to the Petition for Writ of Certiorari, the Solicitor General, for the first time in this suit, asserted that foreign investors seeking to bring a securities fraud claim based on acts that occurred within the United States are subject to more restrictive requirements for enforcement than the SEC. *See* Brief For United States As Amicus Curiae at 16. This position contravenes the position taken by the SEC in the court below, in which it argued that "material and substantial conduct in furtherance of the alleged fraud occurred in the United States" and Petitioners had stated a claim against Defendants for a violation of Section 10(b). PA 49a-50a (footnote omitted).

that "Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action." *Id.* at 165 (quoting S. Rep. No. 104-98, at 4-5 (1995)). Simply put, the implied right of action analysis does not apply after express Congressional action in the PSLRA.

In passing the PSLRA, Congress comprehensively addressed what it viewed as "the evils flowing from abusive securities litigation," S. Rep. 104-98, at 8 (1995), by limiting the private right of action in various ways. Congress explicitly did this in the context of the dual enforcement possibilities provided by Government and private law suits, stating that "[t]he SEC enforcement program and the availability of private rights of actions together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws," *id.*, and that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Conf. Rep. 104-369, at 31 (1995).

Moreover, Congress addressed this subject with specific regard to foreign relations, stating that "*private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors,*

lawyers and others properly perform their jobs." *Id.* (emphasis added).[9]

As part of the PSLRA, "Congress amended the securities laws to provide for limited coverage of aiders and abettors. Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties." *Stoneridge*, 552 U.S. at 162 (citing 15 U.S.C. § 78t(e)). By contrast, the PSLRA does not draw any distinction between SEC enforcement and the private right of action regarding any matter other than aiding and abetting, and certainly not regarding claims that have transnational aspects.

The comprehensive nature of the PSLRA's reform of the private right of action under Section 10(b), the

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[9] None of the *amici* has contradicted the following: recent scholarship has determined that stricter securities enforcement in the United States has led to lower capital costs for companies listed here, as well as a market premium rewarding good corporate governance and transparency, thus making the United States markets *more* attractive than foreign markets with less enforcement. *See, e.g.*, John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 U. Va. L. Rev. 707, 714-15, 727-41 (2009) (lack of securities enforcement causes instabilities in the market, raising capital costs); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007) (active U.S. securities enforcement explains significant market premium for listing foreign stocks on U.S. exchanges); George Andrew Karolyi, *The World of Cross-Listing and Cross-Listings of the World: Challenging Conventional Wisdom*, 10 Rev. Fin. 99, 118 (2006) (investors willing to pay cross-listing premium when foreign companies list in U.S., possibly reflecting investors' willingness to reward greater transparency and investor protection).

attention paid by Congress when drafting the statute to the availability of SEC enforcement, and the statute's specific provision of a distinction between SEC enforcement powers and the private right of action as regards aiding and abetting, supports a presumption that the omission by Congress to make any similar distinction regarding claims with a transnational aspect was intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); 2A Norman J. Singer, *Sutherland Stat. Const.* § 47.23 (7th ed. 2009) (inference that omission is intentional is strengthened "where a thing is provided in one part of the statute and omitted in another").[10]

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[10] The Solicitor General also argues that the SEC's enforcement activities are "not limited by the additional constraints that apply to private suits" because, under the civil penalty provisions of the Exchange Act, 15 U.S.C. § 78u, the SEC also has authority to bring an action for injunctive relief or a monetary penalty without needing to prove "that any investor actually relied on the misrepresentations or that the misrepresentations caused any investors to lose money." S.G. Br. at 12.

However, the argument glosses over the fact that, in order to recover a monetary penalty with a deterrent effect even remotely equivalent to the effect of damages, the SEC still has to prove a species of causation. *See* 15 U.S.C. § 78u(d)(3)(B); *SEC v. Huff*, No. 08-6315-CIV, 2010 WL 148232, at *3 (S.D. Fla. Jan. 12, 2010) ("[T]he SEC must demonstrate not loss causation, but, for lack of a better descriptive term, gain causation.") (footnote omitted)).

V. UNDER THE FACTS ALLEGED IN THE COMPLAINT, THIS CASE MUST PROCEED

A. The Fraud Alleged Was Predicated On Conduct In Florida

Respondents seek to downplay systematically the critical fact that the core conduct constituting the securities fraud took place in Florida. As the Second Circuit correctly noted:

> Appellants assert that the alleged manipulation of the [mortgage servicing rights] by HomeSide in Florida made up the main part of the fraud since those false numbers constituted the misleading information passed on to investors through NAB's public statements. According to Appellants, if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5. Appellants insist that NAB's creation and dissemination of the public statements in question consisted solely of the mechanical insertion of HomeSide's numbers into the statements and public filings and that the locus of the improper conduct (Florida) and not the place of compilation (Australia) should determine jurisdiction.

PA 18a. Because this is an appeal from a dismissal, these facts must be taken as true for purposes of the Court's review. *Leatherman v. Tarrent City Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

Nonetheless, the Second Circuit rejected the clear import of these allegations by invoking the idea, unsupported by the record, that there were "a number of checkpoints manned by NAB's Australian personnel before reaching investors" and that, accordingly, the causal chain was broken. For the Second Circuit, this holding was a predicate for determining whether or not the court had subject matter jurisdiction. PA 21a.

Respondents use this holding to argue that proximate cause is lacking here. Resp. Br. 37. Similarly, the Solicitor General argues that "the component of the alleged fraud that occurred in the United States was not a *direct cause* of petitioners' alleged injury" because HomeSide's fraudulent financials "had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." SG Br. 31 (quoting PA 21a).

As Petitioners noted in their opening brief, this holding by the Second Circuit of a reverse-engineered "intervening" or superseding cause is not supported legally (Pet. Br. 29-31) or, as set forth below, by the factual record. Indeed, Petitioners alleged that NAB "issued or *adopted*" the positive representations made by

HomeSide that were materially false and misleading. JA 45a at ¶ 23 (emphasis added).[11]

None of these claims are reconcilable with the allegations of record. The citations to the Joint Appendix proffered by Respondents simply do not support this argument. The citations to the Complaint simply refer to:

- the individual defendants' general participation in the management of HomeSide in an introductory paragraph describing the parties (JA 44a at ¶ 21);

- a newspaper article that refers to unnamed NAB executives who discussed the hedging debacle at NAB (JA 76-77a at ¶ 112);

- the notification of NAB executives by the Florida whistleblowers of the accounting fraud

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[11] The record is replete with allegations that NAB was fully involved in the wrongful conduct at HomeSide. For example, NAB installed one of its senior officers at HomeSide who monitored HomeSide's daily business activities and reported back to NAB (JA 5a; Second Circuit Joint Appendix at 1484); HomeSide employees acted as "whistleblowers" and advised NAB senior officers of the fraud (JA 90a); and NAB maintained offices in New York City where it engaged in complex financial transactions to hedge HomeSide's outstanding mortgage exposure (JA 76a-80b). As alleged in the Complaint, an analyst report adopted by Petitioners generally described NAB as "asleep at the wheel" with respect to both the fraud at HomeSide and the multi-billion dollar hedging activities in New York. JA 81a at ¶114.

at HomeSide and their resulting knowledge (JA 62a at ¶ 74; JA 89a at ¶ 174).[12]

The Solicitor General and Respondents also attempt to justify the Second Circuit's overreaching by citing to NAB's Annual Reports and Form 20-F filings, which indicate that NAB's operating *segment* results were "reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior [NAB] management." Resp. Br. 12 (emphasis added). This argument is unavailing for several reasons.

First, the language quoted by Respondents did *not* appear in NAB's 1999 Annual Report or Form 20-F; however, NAB's adoption of HomeSide's fraudulent valuation of the MSR asset was reported. SA 6.

Second, in May 2000, NAB announced changes to its corporate structure, which led to the insertion of the language cited by Respondents in NAB's 2000 Annual Report. SA 39. NAB created "six major operating segments," one of which was "HomeSide and National Shared Services." *Id.*[13] It is ambiguous, at best, if

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[12] The final citation proffered by Respondents – JA 74 – simply has no bearing on the issues. The paragraphs on this page of the Complaint discuss the "resignation" of the HomeSide officers and the reaction of certain NAB officers or directors to the writedown.

[13] National Shares Services was an amalgamation of a variety of firm-wide business segments including "operational services, Financial Shared Services, Human Resources Shares Services and Information Technology". SA-39. Thus, under their argument, this checkpoint would have "checked" financial figures already

HomeSide's fraudulent financial data was "evaluated regularly by the chief operating decision maker . . .", *id.*, or whether the combined Home Side *and* National Shared Services were subject to such "evaluation."

Third, neither the Annual Reports nor Forms 20-F provide that the balance sheets containing the MSR entry were ever evaluated or reviewed by anyone at NAB before publication. *See, e.g.*, SA-11; JA 5a (Second Circuit Joint Appendix) at A-344 and A-499; SA-36.

Finally, and most significantly, *this argument was never presented to or considered by the lower courts*. It is nothing more than a futile attempt by Respondents to reverse-engineer a foundation for the Second Circuit's erroneous holding. The Second Circuit *never* cited to these reports.

B. The Conduct of Respondents In Florida Is Actionable

Under Section 10(b), there are two ways of making a false statement, either one of which can serve as a basis for liability: (1) creating the statement, or (2) communicating it to investors.[14] The liability of the

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consolidated with HomeSide's figures as part of their Operating Segment. More importantly, there is no indication the MSR figure in the consolidated balance sheet – the key number in the case – passed through any such "check point."

[14] Webster's New International Dictionary (1934) defines "make" as either "to construct, fabricate" or, alternatively, "to cause" *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.20 and 21 (1976) (citing 1934 edition of Webster's International Dictionary to

person who the statement may attach under either of two legal theories).[15]

Here, the key false statement that appeared in NAB's annual reports and caused plaintiffs' injuries was the MSR line item on the balance sheet. Pet. Br. at 6. This annual number was an "exact repetition of the false financial information that HomeSide concocted in Florida

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define words in the Exchange Act). Thus, both HomeSide and NAB, using these definitions, made the MSR entry misrepresentations. Courts have upheld misrepresentation claims against a party who "fabricated" or "caused", but did not utter, the misrepresentation. *See, e.g., In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 124, 127 (4th Cir. 2009) (claim stated against mutual fund's investment adviser and adviser's corporate parent for misstatements made in mutual fund prospectus, because "investors would have inferred that either or both defendants played a substantial role in *drafting or approving* the allegedly misleading prospectuses") (emphasis added); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005) ("If the [plaintiff] can show that *Firestone* was the *originator* of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that its misrepresentation would be communicated to investors, primary liability should attach [to Firestone].").

[15] In *SEC v. Tambone*, No. 07-1384, 2010 WL 796996 (1st Cir. Mar. 10, 2010), allegedly false statements were made in the prospectus of a mutual fund. The First Circuit rejected the SEC's argument that underwriters who merely "used" the prospectuses to sell shares in the fund could be "makers" of the statements "without regard to the authorship." *Id.* at *1. The court specifically noted that the SEC had dropped its prior assertion that the underwriters "participated in the drafting process," and a person other than the underwriters had "direct responsibility" for issuing the prospectuses. *Id at* *1, 3-4, 9 n.10; *see id. at* *13 (Boudin, J., concurring) ("[t]he word 'make,' in reference to a statement, ordinarily refers to one [1] authoring the statement or [2] repeating it as his own").

for the very purpose of misleading NAB's shareholders." *Id.* at 7.

Moreover, investors had every reason to attribute the original fabrication of these statements to HomeSide and its officers. As the notes to the financial statements specifically stated, "[f]ollowing the acquisition of HomeSide in February 1998, [NAB] derives fees from mortgage servicing," SA-21 and "investors knew that all mortgage servicing income of NAB was derived from HomeSide." *Id.* at 8 n.7.[16] Therefore, actionable conduct occurred in the United States, whether false statements and/or acts in furtherance of a fraudulent scheme, and Section 10(b) should be applied regardless of the fact that the effects and damages from that actionable conduct occurred extraterritorially.[17]

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[16] *See In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 351 (S.D.N.Y. 2005) (where parent corporation's earnings releases and SEC filings misstated profits from specialist operations on the NYSE, and all such operations were conducted through company's subsidiary, misstatements "could have come only from [subsidiary]," and investors may be found to have relied on subsidiary "as if the statement[s] had been publicly attributed to [it]").

[17] Should the Court vacate and remand, the lower courts will need to address several issues that were not previously addressed by the courts. For example:

• whether the Second Circuit properly found that Petitioners' waived their scheme liability claims pursuant to Section 10(b) and Rule 10b-5(a) and (c). PA 20a n. 7. Petitioners believe this finding was incorrect and Respondents apparently concur given their response before this Court. Resp. Br. 36-37.

CONCLUSION

For the foregoing reasons, and in the manner described in the Brief For Petitioners, the judgment of the court of appeals should be reversed.

• whether Petitioners may pursue a Section 20(a) "control person" vicarious liability claim, 15 U.S.C. §78t(a), against NAB based on U.S. conduct alone if necessary.

• whether the argument raised by Respondents for the first time in their opposition brief – that the rule of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 725 (1975), limiting the private cause of action for money damages under Section 10(b) to purchasers and sellers of the security, should be "construed" to require that the purchase or sale have been in the United States (Resp. Br. 52-56) – has any basis in the statute. As the Solicitor General correctly noted, the Court, in *Blue Chip Stamps*, held that the purchaser-seller requirement "limits only the private right of action and is not required by Section 10(b)'s 'in connection with' requirement." SG Br. 21.

• whether the Court below, in treating HomeSide and NAB as primary violators, took into account, under § 402(b) of the Restatement, (Third) of Foreign Relations the current status of multinational enterprises like NAB under customary international law. *See* § 414, cmt. a ("...multinational enterprises do not fit neatly into the traditional bases of jurisdiction); § 402 ("such enterprises may not be nationals of one state only and their activities are not limited to one state's territory.").

Respectfully submitted,

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SUPPLEMENTAL BRIEF

Supreme Court, U.S.
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No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or non wholly owned subsidiaries.

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824 F.2d 27 (D.C. Cir. 1987) 5

SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief to bring to the Court's attention a recent decision by the United States Court of Appeals for the Eleventh Circuit, in which the Court affirmed a district court decision that Petitioners cited in their Petition for a Writ of Certiorari (the "Petition"). The recent Eleventh Circuit decision highlights the significant split of authority among the Circuit Courts of Appeals regarding the assertion of subject matter jurisdiction over foreign securities transactions under the Securities Exchange Act of 1934. *See In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-27T, 2008 WL 4663363 (M.D. Fla. Oct. 21, 2008), *aff'd*, No. 08-16334, __ F.3d __, 2009 WL 2462367 (11th Cir. Aug. 13, 2009) (copy appended as Appendix A).

In their Petition, Petitioners set forth the three divergent approaches among the Circuits to the widely used "conduct test" to determine the existence of subject matter jurisdiction in securities fraud cases: (1) the restrictive test of the District of Columbia Circuit, which requires that the domestic conduct at issue must *itself* constitute a securities fraud violation; (2) at the opposite end of the spectrum, the Third, Eighth and Ninth Circuits require only that *some* activity designed to further a fraudulent scheme occur within the United States; and (3) the Fifth and Seventh Circuits, and the Second Circuit prior to the decision in the instant case, which adopted a middle ground, and require that the domestic conduct in question be more than merely preparatory to the fraud and that it be a direct cause of the loss in question.

In *In re CP Ships Ltd. Sec. Litig.*, 2008 WL 4663363, at *2, the district court, following Second Circuit precedent prior to its decision in *Morrison v. National Austl. Bank*, 547 F. 3d 167 (2d Cir. 2008), asserted subject matter jurisdiction over a claim of securities fraud arising from a financial fraud that was perpetrated, like the one at issue here, in Florida, even though the resulting false financial statements were promulgated, as here, by a foreign corporation headquartered outside the United States (in that case in England; in the instant case, in Australia).

That decision has now been affirmed by the United States Court of Appeals for the Eleventh Circuit. *In Re CP Ships Ltd. Sec. Litig.*, 2009 WL 2462367 (11th Cir. Aug. 13, 2009). The Eleventh Circuit's decision is relevant for two reasons.

First, the Eleventh Circuit joined other Circuits in acknowledging the conflict among the Circuits, noting that the various Circuit Courts of Appeals had theretofore formulated three different and conflicting standards for the application of the "conduct test." *Id.* at *4 n.8 (court contrasted the Second Circuit's standard with the "Third, Eighth and Ninth Circuits . . ., [which] 'generally require some lesser quantum of conduct.'") (citation omitted).

The Eleventh Circuit, which had not yet adopted any of the three competing formulations, followed the parties' "agreement" that the Second Circuit's version of the "conduct test" would apply and, notwithstanding its reservations about the Second Circuit's decision in the instant case, analyzed the appeal according to Second Circuit precedent, including the decision herein, without

reaching the issue of whether the least stringent standard adopted by other Circuits would be more appropriate:

> [T]his case has been litigated by agreement of the parties pursuant to the Second Circuit's articulation of the conduct test. Because we conclude that the Second Circuit's articulation of the test has been met in this case, we need not decide if the less stringent formulation of the test (as used in the Third, Eighth and Ninth Circuits) would also suffice to establish subject matter jurisdiction.

2009 WL 242367, at *6 n.11; *see also id.*, at *4 n.8.

Then, turning to the Second Circuit's decision in the instant case, the Eleventh Circuit held that *CP Ships* was distinguishable from the instant case because in *CP Ships* the foreign corporation's Chief Executive Officer and accounting department worked out of the Florida office, so that the corporate employees charged with verifying the accuracy of the financial statements worked in the United States. In contrast, the Second Circuit found (*with absolutely no support in the record*) that the responsibility for verification of National Australia Bank's financial statements rested with employees in Australia. *See* 2009 WL 2462367, at *5-6.

Second, the Eleventh Circuit made clear its reservations about the Second Circuit's decision in *Morrison*. It noted that, in the instant case, the Second Circuit adopted a more stringent standard than it had

previously applied – but ruled that, owing to the distinctions it found on the facts between *CP Ships* and the instant case, the assertion of subject matter jurisdiction was warranted even under the more stringent standard the Second Circuit has now adopted. The Eleventh Circuit thus did not have to reach the issue of whether the Second Circuit's move to the more restrictive standard of the District of Columbia Circuit was appropriate:

> Moreover, the recent *Morrison* case in the Second Circuit may represent a somewhat more stringent application of the conduct test than was indicated in previous Second Circuit cases. Again, because we conclude that the facts in the instant case also satisfy the *Morrison* application of the Second Circuit test, we need not (and do not) decide whether we should adopt the *Morrison* application of the test. In other words, we need not decide whether to adopt the *Morrison* decision's emphasis on the location of the activities performed in ensuring the accuracy of the financial information to be provided to the public, and *that decision's consequent discounting of the significance of the location of the actual falsification of the relevant numbers*.

2009 WL 2462367, at *6 n.11 (emphasis added).

The Eleventh Circuit concluded:

> Because the facts alleged in the instant case satisfy even the very stringent application of the conduct test articulated in *Morrison*, we need not decide whether the *Morrison* opinion itself correctly denied subject matter jurisdiction *notwithstanding the fact that the false numbers at issue there were actually created in Florida.*

Id. (emphasis added).

The Eleventh Circuit's decision in *CP Ships* confirms that, notwithstanding Respondents' protestations to the contrary, the state of the law is precisely as set forth in Petitioners' Reply Brief. The Circuit Courts of Appeals have formulated three different and conflicting applications of the "conduct test." The Second Circuit, in the instant case, moved from the middle position to the most restrictive position, previously taken only by the District of Columbia Circuit.[1] The Second Circuit's decision below thus conflicts with precedent of the Fifth and Seventh Circuits (which occupy the middle position that used to be shared with the Second Circuit),[2] as well as

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[1] *See Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (domestic conduct must itself constitute a violation of securities laws).

[2] *See Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (Fifth Circuit adopted "[t]he more restrictive position that the domestic conduct must have been 'of material importance to' or have 'directly caused' the fraud complained of. . ."); *Kauthar SDN BHD v. Sternberg*,

of the Third, Eighth, and Ninth Circuits (which take the least restrictive view).[3] Meanwhile, the Eleventh Circuit's disinclination to take a position among this confused welter of possible standards itself shows that guidance from this Court is necessary.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and Petitioners' Reply Brief, the petition for a writ of certiorari should be granted.

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149 F.3d 659, 667 (7th Cir. 1998) (Seventh Circuit holds that "[w]e believe, therefore, that federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss. . .").

[3] *See SEC v. Kasser*, 548 F.2d 109, 114 (3d Cir.) (subject matter jurisdiction lies when "at least *some activity* designed to further a fraudulent scheme *occurs* within this country"), *cert. denied*, 431 U.S. 938 (1977); *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979) (Eighth Circuit adopts identical standard); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (Ninth Circuit adopts identical standard).

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 13, 2009

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-16334

In Re: CP SHIPS LTD. SECURITIES LITIGATION

Geoffrey Gottfried, individually and on behalf of all others similarly situated, Billy R. Hood, James W. Nelson, individually and on behalf of all others similarly situated, Raymond Tyler, on behalf of himself and all others similarly situated, Kirvin Hendrix, *et al.*,

Plaintiffs-Appellees,

v.

Allen Germain,

Interested Party-Appellant,

CP Ships Ltd., Ray Miles, Ian Webber, Frank Halliwell,

Defendants-Appellees.

Before WILSON, KRAVITCH and ANDERSON, Circuit Judges.

Supplemental Appendix

ANDERSON, Circuit Judge:

Objector-Appellant Allen Germain appeals from the district court's final order approving the settlement of a securities class action lawsuit. Germain, a class member in the instant action, is also a member of a class pursuing related litigation in Canada ("Canadian Actions"). Germain is a Canadian citizen who purchased his securities on the New York Stock Exchange ("NYSE"). Germain argues that the district court lacked subject matter jurisdiction over the claims of foreign stock purchasers or, in the alternative, should have declined jurisdiction as a matter of comity. In addition, Germain argues that notice was inadequate and that the settlement is not fair, reasonable or adequate. For the reasons set forth below, we affirm the decision of the district court.

FACTS

Defendant-Appellee CP Ships Ltd. ("CP Ships" or "the Company") is a prominent container shipping company. It operates in several countries. The Company is organized under the laws of Canada and headquartered in London or Gatwick, England. Although officially headquartered in England during the class period (January 29, 2003 to August 9, 2004) ("Class Period"), crucial headquarters activities—including the relevant operations and personnel that were central to the fraud (i.e. the accounting department and executive offices)—were located in Tampa, Florida. These accounting operations were micromanaged by

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Defendant Halliwell, first in his capacity as Chief Operating Officer and later in his capacity as Chief Executive Officer. Halliwell was based in, and worked out of, the Tampa office during the Class Period. Roughly eighty percent of CP Ships' shares are traded on the Toronto Stock Exchange ("TSX") and roughly twenty percent are traded on the NYSE.

From 1993 to 2003, CP Ships acquired nine different businesses. Each business retained its own financial accounting system. In 2004, CP Ships instituted a single accounting platform ("SAP") over most of its businesses. After the SAP implementation, the Company announced that the transition had caused it to understate its operational costs. The Company's stock price dropped approximately 22.4 percent on the NYSE and 21.5 percent on the TSX. The allegations in the instant case and the Canadian Actions are both based on this occurrence.

The instant class action asserts claims for securities fraud in violation of Section 10(b) and 20(a) of the Exchange Act. On April 5, 2007, the district court dismissed the Complaint for failure to meet the heightened requirements for pleading scienter under the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The plaintiffs appealed to this Court. While the appeal was pending, the parties agreed to settle for $1.3 million. This is a small fraction of the original losses of $130 to $180 million alleged in the Complaint. The settlement class includes the claims of some foreigners

but specifically excludes the claims of Canadian citizens who purchased CP Ships stock on the TSX.

After notices of settlement were published, an objector, Earl Downey, argued that the settlement would prevent some members of the Canadian class from pursuing their action in Canada. The district court ultimately issued an order concluding that Downey lacked standing to challenge the settlement. Nonetheless, the plaintiffs issued a supplemental notice ("Supplemental Notice") addressing some of his concerns. It included additional information about the Canadian Actions, including the contact information of the counsel in the Canadian Actions. There was an opportunity to opt out of the class after the Supplemental Notice.

On September 4, 2008, Appellant-Objector Allen Germain filed the instant objections to the settlement ("Objections"). The district court overruled the Objections and approved the settlement. Germain appealed. We first address subject matter jurisdiction, and then address Germain's merits challenges (i.e. to the notice and to the fairness of the settlement).

STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law we review *de novo*. *Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1242 (11th Cir.2007) (per curiam). This Court reviews a district court's

approval of a settlement agreement for an abuse of discretion, *Christo v. Padgett*, 223 F.3d 1324, 1335 (11th Cir.2000), bearing in mind that "[p]roponents of class action settlements bear the burden of developing a record demonstrating that the settlement distribution is fair, reasonable and adequate," *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir.1983).

DISCUSSION

A. *Subject Matter Jurisdiction*

First, we must determine whether Germain raised a facial or factual attack on the existence of subject matter jurisdiction. Then, we will address the question of jurisdiction itself.

1. *A Facial Challenge*

"A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 915, 157 L.Ed.2d 867 (2004). However, "the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission." *Ry. Co. v. Ramsey*, 22 Wall. 322, 89 U.S. 322, 327, 22 L.Ed. 823 (1875); *see also United States v. Harty*, 930 F.2d 1257, 1261 (7th Cir.1991) ("Although challenges to subject matter jurisdiction may be raised at any time, the appellants' argument . . . is a factual challenge not raised before the district court. This court has repeatedly

stated that arguments raised for the first time on appeal are waived.") (internal citations and quotations omitted).[1]

Thus, there are two types of challenges to the existence of subject matter jurisdiction. "A 'facial attack' on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir.2007) (internal quotations and alterations omitted). " 'Factual attacks,' on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered." *Id.* (internal quotations omitted). In a factual challenge, "the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of

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1. *Accord Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 265 (4th Cir.2004) (concluding that defendant-appellant could admit facts establishing that it was an ERISA fiduciary, although that conclusion was inextricably intertwined with the district court's subject matter jurisdiction); *Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc.*, 780 F.2d 549, 551 (6th Cir.1986) ("The rule that jurisdictional facts which are admitted by the parties may establish subject matter jurisdiction over a case is a salutory one that promotes speedy and inexpensive litigation."); *Verzosa v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 589 F.2d 974, 977 (9th Cir.1978) (per curiam) ("It is well settled that one may stipulate to facts from which jurisdiction may be inferred.") (quotation omitted).

the motion to dismiss." *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.1981).[2]

We conclude that Germain raised only a facial challenge before the district court. Germain did not advise the district court that he intended to raise a factual challenge. Nor did Germain request discovery or an evidentiary hearing. It is also clear from the transcript of the Final Approval Hearing that Germain was raising only a facial challenge to the Complaint.[3] Furthermore, the district court's opinion expressly treats Germain's attack as facial, and he did not file a motion for reconsideration stating that he intended to mount a factual attack on the Complaint.[4]

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2. Fifth Circuit decisions issued before October 1, 1981 are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

3. The following excerpt from the Final Approval Hearing is representative of the dialogue:

> The Court: And, obviously, the question is why are these *allegations* not sufficient to satisfy the conduct part of that conduct effects analysis that the *Berger* court discusses.
>
> [Counsel for Germain]: Yes, Your Honor. The problem with all of those *allegations* that were just recited, Your Honor, is that they are not instances of fraudulent conduct here in the U.S.

(emphasis added).

4. Even on appeal, Germain did not advise this Court of his intent to raise a factual challenge to subject matter jurisdiction until he filed his Reply brief.

Furthermore, Germain has not at any time expressly challenged any facts determinative of subject matter jurisdiction. As discussed below, the allegations in the Complaint establish that substantial fraudulent activity occurred at CP Ships' Tampa, Florida, accounting office. On appeal, Germain challenges only facts tangential to that conclusion. There is no evidence in the record to suggest that the district court in fact lacked subject matter jurisdiction.[5] *Cf. Rubin v. Buckman*, 727 F.2d 71, 72-73 (3d Cir.1984); *Eisler v. Stritzler*, 535 F.2d 148, 150-52 (1st Cir.1976).[6] We will not remand simply to allow Germain to embark on a "fishing expedition."

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5. At oral argument, Germain made much of the fact that the headquarters of the Company was in England and that the false or misleading statements were disseminated from England. Those facts, however, are not inconsistent at all with the alleged facts that the Company's accounting department, and the relevant operations and personnel central to the fraud, were located in Tampa. Especially in light of the fact that Germain never advised the district court that he was making a factual challenge, the mere assertion of such facts cannot be deemed to have put the district court on notice that Germain was making a factual challenge.

6. In *Rubin*, the plaintiff revised his original allegation that he was a citizen of Hong Kong after the district court entered summary judgment in favor of the defendant. 727 F.2d at 72-73. The record in fact indicated that the plaintiff had a United States passport. *Id.* at 73. Thus, the Third Circuit remanded for the district court to conduct further discovery on the existence of diversity jurisdiction.

In *Eisler*, the defendant revised his original admission that he was a citizen of Puerto Rico after the district court entered a

(Cont'd)

Accordingly, we turn to Germain's facial attack on the existence of subject matter jurisdiction. Although Germain himself, a Canadian citizen, bought his securities on the NYSE, he not only challenges the district court's jurisdiction over similar plaintiffs, but also challenges the district court's jurisdiction over other foreign investors who purchased on the TSX.

2. *The Allegations in the Complaint*

"It is well recognized that the Securities Exchange Act is silent as to its extraterritorial application." *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121 (2d Cir.1995). Thus,

> [w]hen, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.

Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.1975). The provisions and purposes of the Securities Exchange Act serve as a guide.

(Cont'd)

default judgment against him. 535 F.2d at 150-52. The defendant filed an affidavit stating that he was a citizen of California at the time the action was brought. *Id.* at 151. Thus, the First Circuit remanded for a hearing on the existence of diversity jurisdiction.

Supplemental Appendix

The courts have reached two broad conclusions with respect to transnational securities frauds. First, "it is consistent with the statutory scheme to infer that Congress would have wanted to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir.2008) (internal quotations omitted). Second, "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners . . . ." *Bersch*, 519 F.2d at 987.

These principles have been distilled into two jurisdictional tests: the "conduct test" and the "effects test." *S.E.C. v. Berger*, 322 F.3d 187, 193 (2d Cir.2003). The court asks: "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Id.* at 192. "Where appropriate, the two parts of the test are applied together because an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court." *Morrison*, 547 F.3d at 171 (internal quotations omitted). We conclude that the Complaint alleges ample facts sufficient to establish subject matter jurisdiction under the "conduct test" over unnamed foreign class members who purchased on the TSX.[7] Accordingly, we need not address the "effects test."

7. It follows, *a fortiori*, that the Complaint alleges sufficient facts to establish subject matter jurisdiction over unnamed foreign class members who purchased on the NYSE.

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Jurisdiction exists under the "conduct test" when "substantial acts in furtherance of the fraud were committed within the United States."[8] *Berger*, 322 F.3d at 193 (internal quotations omitted). "[T]he test is met whenever (1) the defendant's activities in the United States were more than merely preparatory to a securities fraud conducted elsewhere and (2) the activities or culpable failures to act within the United States directly caused the claimed losses." *Id.* (internal quotations omitted).

The Second Circuit's decision in *Berger* is instructive. Defendant Michael Berger formed an offshore investment company ("the Fund") organized under the laws of the British Virgin Islands. *Id.* at 188. The Fund maintained a brokerage account at a broker-dealer located in Ohio and the majority of its assets and securities were held in the United States. *Id.* Berger, working in New York, created fraudulent account statements and forwarded them to the Fund administrator in Bermuda. *Id.* at 189. The Fund administrator, operating in Bermuda, relied on these fraudulent calculations to prepare and mail monthly

8. The parties agreed that the Second Circuit's articulation of the conduct test is appropriate, and we conclude that it has been met. Therefore, we need not (and do not) decide if a less stringent formulation would also suffice to establish subject matter jurisdiction. *See, e.g., Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 666 (7th Cir.1998) ("[T]he Third, Eighth and Ninth Circuits . . . to use the Fifth Circuit's words, 'generally require some lesser quantum of conduct.' " (quoting *Robinson v. TCI/US West Comme'n Inc.*, 117 F.3d 900, 906 (5th Cir.1997))).

account statements to investors.[9] Applying only the "conduct test," the Second Circuit held "that subject matter jurisdiction clearly exists over Berger's actions." *Id.* at 194. "Clearly, the fraudulent scheme was masterminded and implemented by Berger in the United States." *Id.*

The circumstances of the instant case are analogous. CP Ships is a foreign corporation. However, the Complaint alleges that the SAP conversion project occurred in the Company's Tampa, Florida, accounting offices, where personnel—including key executives—knowingly caused costs to be understated. The Tampa offices then transmitted this false data to the Company's foreign offices, where it was incorporated into allegedly false and misleading financial statements that were disseminated from abroad. Accordingly, we conclude that subject matter jurisdiction exists over CP Ships' actions. The allegedly fraudulent scheme was masterminded by Halliwell and other executives operating out of Tampa, and implemented in substantial part by those executives in Tampa.

Germain seeks to dissuade us. Under the "conduct test," Germain asserts: (1) the accounting activity in Tampa was merely preparatory to the creation and dissemination of allegedly false and misleading statements outside the United States; and (2) the creation and dissemination of allegedly false and

9. The Fund had approximately 280 investors, only a small percentage of whom had addresses in the United States. *Id.* at 188.

misleading statements outside the United States (rather than the manipulation of accounting information in Tampa) directly caused the claimed losses. For support, Germain relies on the Second Circuit's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167 (2d Cir.2008).

In *Morrison*, the plaintiffs brought a class action against, *inter alia*, National Australia Bank ("NAB") and its wholly owned American subsidiary HomeSide Lending Inc. ("HomeSide"). The plaintiffs alleged that HomeSide, a mortgage service provider, manipulated its internal books and records and sent false numbers from HomeSide's Florida headquarters to NAB's Australia headquarters—where the allegedly false numbers were incorporated into public statements and disseminated from Australia. *Id.* at 168-79, 171. The Second Circuit held:

> The actions taken and the actions not taken by NAB in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida.

Id. at 176. After noting that HomeSide was merely a wholly owned, operational subsidiary, the court elaborated:

> The responsibilities of NAB's Australian corporate headquarters, on the other hand,

included overseeing operations, including those of the subsidiaries, and reporting to shareholders and the financial community. NAB, not HomeSide, is the publicly traded company, and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world.

. . .

NAB's executives possess the responsibility to present accurate information to the investing public and to the holders of its ordinary shares in accordance with a host of accounting, legal and regulatory standards. When a statement or public filing fails to meet these standards, the responsibility, as a practical matter, lies in Australia, not Florida.

. . .

In other words, while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors. While HomeSide's rigging of the numbers may have contributed to the misinformation, a number of significant events needed to occur before this

> misinformation caused losses to investors. This lengthy chain of causation between what HomeSide did and the harm to investors weighs against our exercising subject matter jurisdiction.

Id. at 176-77. In holding that it lacked subject matter jurisdiction over foreign plaintiffs who purchased on foreign exchanges, the Second Circuit placed primary reliance on the fact that all the executives with responsibility for ensuring the accuracy of information provided to the investing public operated out of Australia, and all of the actions of those executives in verifying such information occurred in Australia. In addition, the Second Circuit relied upon the "lengthy chain of causation between the American contribution to the misstatements and the harm to investors." *Id.* at 176. In other words, "those numbers had to pass through a number of check points manned by NAB's Australian personnel before reaching investors." *Id.* at 176-77.

We conclude that the instant case is distinguishable. The Complaint in this case alleges:

> Defendant Halliwell was Chief Operating Officer and a Director and member of the Executive Committee of CP Ships during the Class Period. From May 2004 through the end of the Class Period . . . Halliwell served as the Company's Chief Executive Officer . . . . He was based in, and worked out of the Company's Tampa offices throughout the

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> Class Period . . . . [D]efendant Halliwell made materially false and misleading statements contained in the Company's releases and/or signed the Company's materially false and misleading SEC filings.

Complaint at 23. The Complaint continues:

> Although CP Ships is officially headquartered in England, most headquarters operations—*including the relevant operations and* personnel which were central to the misconduct in this case throughout the Class Period—were located in the Company's offices in Tampa, Florida. The Tampa offices contained, *inter alia*, the Company's accounting department . . . and the executive offices on the thirty-third floor which housed key CP Ships executives, including CEO Halliwell.

Complaint at ¶ 38. In paragraph 39, the Complaint alleges that the SAP conversion project occurred in Tampa. This Standard Accounting Platform was implemented in January 2004, and was used in the May 11, 2004, press release to excuse or explain the initial revelation that the financial results for 2003 had to be revised. This press release is challenged in the Complaint as being false and misleading: it allegedly buried and downplayed the needed revision, both understating the significance thereof, and misleadingly stating that it did not affect the Company's 2004 outlook. This May 11,

2004, press release, and the related statements and SEC filings, were issued after Halliwell had been promoted from his Chief Operating Officer position to Chief Executive Officer of the Company, and thus at a time when Halliwell, operating out of Tampa, bore the primary responsibility not only for the alleged manipulation of the numbers, but also for ensuring the accuracy of financial information provided to investors. Indeed, paragraph 41 of the Complaint alleges that "he controlled everything from Tampa."

Thus, we conclude that the instant case is very different from *Morrison*. Although the problematic numbers in *Morrison* may have originated in the United States, all of the executives bearing responsibility to present accurate information to the investing public, and all of their actions in supervising and verifying such information, occurred in Australia. By contrast, in the instant case, not only did the manipulation and falsification of the numbers occur in Florida, the executives with responsibility for ensuring the accuracy of the accounting data operated from Florida. The accounting department for the Company was located in Tampa, and operated under the micromanagement of Halliwell (first in his position as Chief Operating Officer and later as Chief Executive Officer). Although other divisions of the Company's headquarters were located in its official headquarters in England, the headquarters operations "which were central to the misconduct in this case . . . were located in the Company's offices in Tampa." A number of the statements challenged in this Complaint

were actually made or signed by Halliwell, who was based in and operated out of Tampa. Although it is true that other challenged statements were made by Defendant Miles or Defendant Webber (who operated out of England) there is no indication in the Complaint that they performed any verification activities with respect to ensuring the accuracy of the information generated in Tampa. In any event, the most that could be said is that they also bore some responsibility in that regard, in addition to the primary responsibility borne by Halliwell in Tampa. Furthermore, in the instant case, and unlike *Morrison*, the Complaint indicates no lengthy chain of causation between the American contribution to the misstatements and the harm to investors. Rather, the causation here was direct and immediate.[10]

Accordingly, we conclude that *Morrison* is distinguishable, and that the alleged activity in Tampa represents substantial acts in furtherance of the fraud

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10. We note that, in cases decided before *Morrison*, the Second Circuit had expressly rejected the argument that, although the actual manipulation and falsification of the numbers occurred in the United States, "the inaccurate monthly account statements [were] prepared and mailed to investors by the Fund administrator in Bermuda, [and they] constitute[d] the heart of the fraud." *Berger*, 322 F.3d at 193; *see also id.* at 193-95. *Accord Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir.1995) ("[W]e hold that the situs of preparations for SEC filings should not be determinative of jurisdictional questions. Otherwise, the protection afforded by the Securities Exchange Act could be circumvented simply by preparing SEC filings outside the United States.").

which directly caused the claimed losses.[11] We conclude that the district court properly exercised subject matter jurisdiction over the claims of foreign purchasers.[12]

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11. As noted above, *see supra* note 8, this case has been litigated by agreement of the parties pursuant to the Second Circuit's articulation of the conduct test. Because we conclude that the Second Circuit's articulation of the test has been met in this case, we need not decide if the less stringent formulation of the test (as utilized in the Third, Eighth and Ninth Circuits) would also suffice to establish subject matter jurisdiction. Moreover, the recent *Morrison* case in the Second Circuit may represent a somewhat more stringent application of the conduct test than was indicated in previous Second Circuit cases. Again, because we conclude that the facts in the instant case also satisfy the *Morrison* application of the Second Circuit test, we need not (and do not) decide whether we should adopt the *Morrison* application of the test. In other words, we need not decide whether to adopt the *Morrison* decision's emphasis on the location of the activities performed in ensuring the accuracy of financial information to be provided to the public, and that decision's consequent discounting of the significance of the location of the actual falsification of the relevant numbers. Because the facts alleged in the instant case satisfy even the very stringent application of the conduct test articulated in *Morrison*, we need not decide whether the *Morrison* opinion itself correctly denied subject matter jurisdiction notwithstanding the fact that the false numbers at issue there were actually created in Florida.

12. With respect to Germain himself, the district court's exercise of subject matter jurisdiction is bolstered by the fact that he purchased his securities on the NYSE. Although Germain may not have standing to object on behalf of foreigners who purchased on the TSX, we nevertheless address that issue because of our obligation to examine our jurisdiction *sua sponte*. We note however that the record suggests that there are not many of such foreigners.

Supplemental Appendix

B. *The Merits: Germain's Objections*

Having established that the district court properly exercised subject matter jurisdiction, we turn to the merits.[13] First, we will address the adequacy of notice to the class. Then, we will turn to the adequacy of the settlement itself.

1. *Notice*

Federal Rule of Civil Procedure 23(e)(1)(B) requires the court to provide "direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]." Notice must be "reasonably calculated, under all the circumstances, to apprise

13. Germain also argues that we should abstain from exercising jurisdiction as a matter of comity. We review a district court's decision to deny abstention based on international comity for abuse of discretion. *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1303 (11th Cir.2008). This Court weighs three factors in determining whether to abstain: "(1) international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources." *Belize*, 528 F.3d at 1305.

First, with respect to principles of comity, we note that "courts regularly permit parallel proceedings in an American court and a foreign court." *Turner Entm't v. Degeto Film*, 25 F.3d 1512, 1521 (11th Cir.1994). Second, as discussed below, the settlement is fair, reasonable and adequate. Finally, the American courts have invested substantial judicial resources in this lawsuit, and the resources invested by the Canadian courts will be unaffected with respect to opt-outs and Canadian citizens who purchased on the TSX. Accordingly, we conclude that the district court did not abuse its discretion.

interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Germain argues, in essence, that notice did not reasonably apprise class members of their rights with respect to the Canadian Actions. This argument is without merit. The Supplemental Notice expressly informs class members of the Canadian Actions, provides contact information for further inquiries, and states that failure to opt out of the present settlement might preclude participation in the Canadian Actions.

2. *The Settlement*

The district court reviews a class action settlement to determine whether it is fair, reasonable and adequate. *See Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir.1984). The court considers these relevant factors:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved

Id. at 986. Germain alleges essentially that the district court erred in approving the settlement because foreign

class members have potential for a greater recovery in the Canadian Actions. Germain makes no attempt to argue that the settlement is unfair for reasons outside the existence of the Canadian Actions. Thus, our consideration is limited to this single factor. We observe that notice adequately informed class members of the pending Canadian Actions. They were provided with the necessary information to pursue further inquiries. Any class member wishing to pursue the Canadian Actions could opt out of the instant settlement. Recovery in the Canadian action remains speculative, and, finally, there is no allegation that the instant recovery is otherwise unfair. Accordingly, we discern no abuse of discretion in the district court's approval of the settlement. *Cf. In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 222 (11th Cir.1981) ("We agree with the district court that releases from state claims are generally reasonable and the objectors have not pointed to any extraordinary factors dictating different treatment of the state-claim releases here.").

CONCLUSION

For the foregoing reasons, we conclude that the district court properly exercised subject matter jurisdiction over the claims of foreign purchasers. On the merits, Germain's objections are easily dismissed.[14] Accordingly, the decision of the district court is

AFFIRMED.

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14. All arguments not explicitly addressed are rejected without need for further discussion.

SUPPLEMENTAL BRIEF

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(7)

No. 08-1191

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IN THE

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Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief in response to the Brief For The United States As Amicus Curiae filed with the Court on October 27, 2009 ("Amicus Br."). In that brief, the

Solicitor General, on behalf of the Securities and Exchange Commission ("SEC"), advanced two arguments that strongly support Petitioners.

First, the Solicitor General found that Petitioners adequately alleged a substantive violation of Section 10(b) of the Securities Exchange Act of 1934 against defendants because the fraudulent scheme set forth in the complaint "involved significant conduct within the United States that is material to the fraud's success." Amicus Br. at 13.

Second, the Solicitor General found that the conduct of defendant HomeSide Lending, Inc. ("HomeSide") and the officer defendants of HomeSide "within the United States... was not peripheral or merely prepatory, but was in integral component of the overall scheme." *Id.*

Despite these findings, the Solicitor General opined that the Court should deny the petition for a writ of certiorari for the following reasons:

1. "[W]hile the approaches of the various courts of appeals have not been entirely uniform, petitioners identify no case indicating that any other circuit would have allowed their suit to go forward." *Id.* at 17.

2. "Because the scheme had a sufficient connection to the United States to bring it within Section 10(b)'s substantive prohibition, the SEC could have pursued an enforcement action based on the facts alleged in petitioners' complaint." *Id.* at 13. However, petitioners could not pursue this civil claims because "the link between HomeSide's alleged false statements and the

ultimate harm to petitioners are too indirect to support liability in a private suit." *Id.* at 15.

As more fully set forth below, the Solicitor General essentially concedes that there is a split among the circuits but seeks to minimize the split. The plain words of the circuits (*i.e.*, that "the circuits are divided" on this issue) belie and undercut the Solicitor General's attempt to minimize the issue.

Petitioners clearly would have prevailed under the "in furtherance test" adopted by the Third, Eighth and Ninth Circuits. The SEC itself noted in its amicus brief submitted to the Second Circuit that "the domestic conduct [alleged by Petitioners in the complaint] was an integral link in the chain of events to the overseas investors' losses." App. 75a-76a.

The Solicitor General's position that the alleged scheme to defraud would give rise to an SEC enforcement action but not a private Attorney General civil class action is not a principled distinction. Indeed, the position may be viewed as *sub silentio* adoption of the anti-class arguments advanced by respondents and their amici in this action.

DISCUSSION

A. The Solicitor General Concedes The Split Among The Circuits

The Solicitor General's comment that "the approaches of the various courts of appeals have not been entirely uniform" (Amicus Br. at 17) simultaneously concedes a split among the circuits while attempting to minimize the significance of the split is, at best, an understatement.

As Petitioners explained in the prior briefs, the Fifth Circuit explicitly held that "*[t]he circuits are divided* as to precisely what sort of activities are needed to satisfy the conduct test . . . ." *Robinson v. TCI/US W. Commc'ns, Inc.*, 117 F.3d 900, 905 (5th Cir. 1997)(emphasis added).

Similarly, the Seventh Circuit has held that "the circuits that have confronted the [conduct test] have articulated a *number of methodologies*." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665-66 (7th Cir. 1998)(emphasis added) (analyzing spectrum of holdings, with the District of Columbia Circuit taking the most restrictive approach, the Third, Eighth and Ninth Circuits taking the most permissive approach, and the Second and Fifth Circuits setting a "course between the two *extremes*")(emphasis added).

Also, Judge Bork in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), analyzed the split among the circuits and observed that "[t]he Second Circuit has set the most *restrictive* standard", *id.* at 303, while

"[t]he Third, Eighth and Ninth Circuits appear to have *relaxed* the Second Circuit's test." *Id.* at 304 (emphasis added).

The Solicitor General also ignores the position advanced by the SEC itself in the SEC's amicus brief submitted to the Second Circuit. In that brief, the SEC opined that there is a significant split among the circuits. App. 55a-56a (citing *Kauthar* and analyzing the distinct and competing conduct test methodologies adopted, respectively, by: (a) the District of Columbia Circuit; (b) the Second, Fifth and Seventh Circuits; and (c) the Third, Eighth and Ninth Circuits).

In sum, there is a significant split among that circuits that only this Court may resolve. As noted by a leading treatise, "[o]ne of the primary purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." E. Gressman et al., Supreme Court Practice § 4.4 (9th ed. 2007).

B. Petitioners Would Have Prevailed In The Third, Eighth or Ninth Circuits

The Solicitor General argues that "petitioners identify no case indicating that any other circuit would have allowed their suit to go forward." Amicus Br. at 17. That statement simply is not true. In their Petition For A Writ Of Certiorari and again in their Reply Brief, Petitioners explained how they would have prevailed under the "in furtherance of"/"but for" conduct test adopted by the Third, Eighth and Ninth Circuits.

As explained in *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), this standard provides that "[t]he federal securities laws . . . grant jurisdiction in transnational securities cases where at least *some activity* designed to further a fraudulent scheme *occurs* within this country." *Id.* at 114. *See also Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 415 (8th Cir. 1979) (Eighth Circuit adopted identical standard); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983) (Ninth Circuit adopted identical standard).

In particular, the Eighth Circuit in *Continental Grain (Austl.) Pty Ltd.* found subject matter jurisdiction under the conduct test because "[e]ven though the ultimate effect ... was felt in Australia, *the fraudulent scheme of nondisclosure was devised and completed in the United States. Then it was 'exported' to Australia.*" 592 F.2d at 420 (emphasis added).

In *SEC v. Wolfson*, No. 02:03CV914DAK, 2003 WL 23356418 (D. Utah Dec. 10, 2003), the court noted that the relaxed standard of the Third, Eighth and Ninth Circuits stands in direct contrast to "[t]he more restrictive position . . . that the domestic conduct must have been of 'material importance' or 'significant' to the fraud and have 'directly caused' the alleged loss [as] followed in the Second, Fifth, and District of Columbia Circuits." *Id.* at 15.

In *Wolfson*, defendants urged the court to follow the Second Circuit's approach, requiring the domestic conduct to have been of "material importance" to and

have "directly caused" the alleged fraud. *Id.* The court declined to adopt this restrictive approach and, instead, held that The Tenth Circuit was aligned with the more relaxed standard adopted by the Third, Eighth and Ninth Circuits. *Id.* Based on the conduct alleged by the SEC – defendants sold shares in five microcap companies to investors located primarily in the United Kingdom – defendants "engaged in conduct material to the completion of the fraud in the United States" and "jurisdiction is appropriate despite the fact that additional relevant conduct occurred abroad." *Id.* at *16-17 (citations omitted).

Here, the Florida-based individual defendants conceived the fraudulent scheme in Florida, perpetrated the fraud in Florida by manipulating the assumptions in HomeSide's MSR valuation models, generated the fraudulent financials using those models and then transmitted that fraudulent data to Australia knowing that it would be ministerially and automatically incorporated into its parent's financials. As the SEC found in its amicus brief to the Second Circuit, "the domestic conduct was an integral link in the chain of events to the overseas investors' losses." App. 75a-76a.

Accordingly, Petitioners would have prevailed had their complaint been analyzed under the standard adopted by the Third, Eighth and Ninth Circuits.[1]

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[1] The Solicitor General argues that the transactional reach of Section 10(b) is not one of subject matter jurisdiction but an element of a federal securities fraud claim, citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). Amicus Br. at 8-11. It appears that no court has applied the *Arbaugh* analysis to a federal securities fraud claim. *See, e.g., In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 529 (S.D.N.Y. 2007) ("Court need not decide the issue" because "movants here prevail in either event.") Similarly, here, Petitioners would have prevailed in either event had they been subject to the applicable standard in the Third, Eighth or Ninth Circuits. That is, the fraudulent scheme that occurred in Florida at HomeSide was of "material importance" or "significant" to the fraud and directly caused Petitioners' losses, thus allowing Petitioners to prevail in these circuits under a jurisdiction or merits-based standard. In addition, treating the issue as one *not* of subject matter jurisdiction, but rather the merits of the claim, and accepting the Solicitor General's analysis that Petitioners here state a claim, leads to a reversal and remand to determine the factual question of whether the United States-based conduct indeed "caused" the allegedly false representations to be issued. The Solicitor General's view that the SEC may have jurisdiction where private plaintiffs do not adds an unexpressed jurisdictional limitation not present in the statute or permitted under *Arbaugh*. *See Arbaugh*, 546 U.S. at 516 n.11.

C. The Link Between HomeSide's Fraud And The Ultimate Harm To Petitioners Is Sufficiently Direct To Support Liability

The Solicitor General also argues that the link between HomeSide's alleged false statements and the ultimate loss to Petitioners was too indirect to support liability in a private suit. Amicus Br. at 15. In support of that position, the Solicitor General cites to the Second Circuit opinion in which the court stated, *without any support to the record*, that "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." Amicus Br. at 15.

This "finding" by the Second Circuit *has no support in the record and simply is not true*. HomeSide and the individual defendants, based on documents produced by former HomeSide employees, deliberately undervalued HomeSide's mortgage portfolio. HomeSide's fraudulent financial information was transmitted to NAB in Australia, whereupon NAB incorporated this fraudulent information into its annual reports, reprinting the

fraudulent financial statements of HomeSide *line-by-line*.[2]

D. The Scheme To Defraud Had An Effect In The United States Since NAB's ADRs Were Sold On The New York Stock Exchange

The Solicitor General, in arguing an "indirect link" between the fraud and ultimate loss to the putative class, also ignores that NAB's American Depository Receipts ("ADRs") traded on the New York Stock Exchange ("NYSE"). Certain American purchasers of the ADRs stepped forward as plaintiffs in this action, but could not pursue their claims because the district court found that their trading records indicated that they had not suffered losses. Regardless of this result, the existence of ADRs trading on the NYSE establishes an effect in the United States.

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[2] For example, in each of NAB's Annual Reports issued during the Class Period, NAB listed the operating profits of HomeSide as a separate line item under its United States businesses. *See e.g.*, Joint Appendix filed with the Second Circuit at A-312. Similarly, NAB separately listed its Net Mortgage Servicing Fees in its Annual Reports (*id.* at A-307), which specifically itemized the amounts contributed by HomeSide, making clear that "fees from mortgage servicing," and thus by definition the capitalized Mortgage Servicing Rights, "[f]ollow[ed] the acquisition of Homeside" and were all "derive[d]" from HomeSide. *Id.* No mortgage servicing fees were "derive[d]" from other business units of NAB as reflected on its financial statements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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SUPPLEMENTAL BRIEF

Supreme Court U.S.
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No. 08-1191

IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief to bring to the Court's attention possible implications flowing from a decision issued only last week. In *Reed Elsevier v. Muchnick*, No. 08-103, 2010 WL 693679, at *8 (U.S. Mar. 2, 2010), the Court held that the registration requirement of the Copyright Act, 17 U.S.C.A. § 411(a), is not jurisdictional. The Court, evidencing "a marked desire to curtail such 'drive-by jurisdictional rulings,'" *id.*, at *5 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-12 (2006)), reversed "the judgment of the Court of Appeals for the Second Circuit and remand[ed] this case for proceedings consistent with this opinion." *Id.* at *11. For the reasons set forth in *Reed Elsevier*, Petitioners request that this Court vacate the rulings below and remand the matter.

This is the second time since Petitioners filed their writ of certiorari on March 23, 2009, that the Court has addressed the question of subject matter jurisdiction in the statutory context. This is the only issue before the Court in the present matter. Petitioners sought review of a Second Circuit judgment in which the court affirmed the dismissal of Petitioners' federal securities law claims on grounds that the court lacked subject matter jurisdiction. The lower courts' rulings were limited to this jurisdictional analysis under Fed. R. Civ. P. 12(b)(1). *See* Appendix to the Petition for a Writ of Certiorari, filed March 23, 2009, at 5a.

The Court granted certiorari on November 30, 2009. Eight days later, this Court issued its Opinion in *Union Pacific Railroad Co. v. Brotherhood of Locomotive*

Engineers and Trainmen General Committee of Adjustment, Central Region, 130 S. Ct. 584 (2009), in which the Court reaffirmed its holding in *Arbaugh* that subject matter jurisdiction is a matter of statutory construction and should not be confused with the need to prove the essential elements of a claim for relief.

Last week, the Court issued its Opinion in *Reed Elsevier*, 2010 WL 693679, in which the Court reaffirmed its holdings in *Arbaugh* and *Union Pacific*.

All briefing is complete in this appeal, with the exception of Petitioners' Reply Brief. Petitioners, Respondents and 19 amici, including the Solicitor General, all agree that the Second Circuit's jurisdictional holding was wrong. Not one party or amici seeks to defend the holding of the Second Circuit.

Respondents candidly state that the Second Circuit's ruling on subject matter jurisdiction "was wrong." Brief For Respondents at 22. The Solicitor General similarly argued that the Second Circuit "erred in treating the limits in Section 10(b)'s [15 U.S.C. § 78j(b)'s] transnational application as constraints on their subject matter jurisdiction." Brief For The United States As Amicus Curiae Supporting Respondents at 6. As the Court has noted, "When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court." *Alvarado v. United States*, 497 U.S. 543, 544 (1990).

Petitioners cannot identify the live issue before the Court if all parties concede that the subject matter jurisdictional ruling cannot stand. The only order below was a decision under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, and no other issue has been addressed by any Court. That order was the subject of appeal and the subject of the Petition to this Court. No other party has appealed or presented any other point of error to the Court.

Accordingly, Petitioners urge that the proper course of action is to remand for the courts below to review their rulings in light of *Union Pacific* and *Reed Elsevier*. In those recent cases, the Court has made clear that lower courts cannot "miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier*, 2010 WL 693679, at *5 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

The requested relief is appropriate under the circumstances set forth by Justice Scalia in *Lawrence v. Chater*, 516 U.S. 163 (1996):

> (1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan v. Long*, 463 U.S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgement of established practice, though not necessarily in agreement with its validity) where the respondent or

> appellee confesses error in the judgment below.

Id. at 191-92.

Here, there have been two intervening factors that have a legal bearing upon the decisions: *Union Pacific* and *Reed Elsevier*. In such cases "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and it appears that such a redetermination may determine the ultimate outcome of the litigation, a [grant, vacate, reversal] order is, we believe, potentially appropriate." *Lawrence*, 516 U.S. at 167.

In addition, this Court has used its "granted, vacated, and remanded" power to allow for "further consideration" in the lower court "in light of the position asserted by the Solicitor General" before the Court. *See, e.g., Brown v. United States*, 538 U.S. 1010 (2003); *Jackson v. Massanari*, 534 U.S. 801 (2001). Here, the Solicitor General raised for the first time in her Brief For The United States As Amicus Curiae Supporting Respondents that "[t]he SEC's reasonable interpretation of Section 10(b)'s scope is entitled to deference." *Id.* at 18. While the SEC advanced a form of the "significant and material conduct" test in its amicus brief submitted to the Second Circuit, it did not claim deference and the lower court did not consider it. We believe that the Second Circuit's view might very well be altered by the SEC's interpretation of

Section 10(b) and invocation of the deference doctrine given the Second Circuit's location in the heart of the nation's financial center and its special expertise in matters pertaining to securities.

In sum, the district court and the Second Circuit limited their rulings to subject matter jurisdiction, and did not consider the merits of Petitioners' complaint or other grounds for dismissal. By reversing and remanding the case, the Court "conserves the scarce resources of the Supreme Court, assists the court below by flagging a particular issue that it does not appear to have fully considered, and Supreme Court by procuring the benefit of the lower court's insight before ruling on the merits." *Wellons v. Hall*, 130 S. Ct. 727 (2010).

For the foregoing reasons, Petitioners request that the Court vacate the judgment of the Second Circuit and remand the case for further proceedings consistent with *Reed Elsevier*.

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 statement contained in respondents' brief on the merits remains accurate.

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Supreme Court of the United States

No. 08-1191

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents respectfully submit this supplemental brief under this Court's Rule 25.6 and in response to petitioners' March 10, 2010 supplemental brief addressing this Court's decision in *Reed Elsevier, Inc. v. Muchnick*, No. 08-103 (U.S. Mar. 2, 2010). Petitioners' supplemental brief is both improper and meritless. It is a transparent effort to avoid a decision on the very question petitioners have presented to this Court.

1. Petitioners' brief is improper because Rule 25.6 provides that a supplemental brief may address "intervening matter that was not available in time to be included in a brief." Petitioners' reply brief is due

on March 22, 2010, and has not been filed yet. Their antedated supplemental brief should be stricken. *Cf.*, *e.g.*, *Republic of Iraq v. Beaty*, 129 S. Ct. 1935 (2009) (mem.).

2. a. Petitioners' supplemental brief is also meritless. Grasping at *Reed Elsevier*, a case that applies principles that this Court has articulated and applied for decades, *see*, *e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946), *cited in Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), petitioners now claim that they "cannot identify the live issue before the Court," Pet. Supp. Br. 3. But the live issue is exactly the one they presented (one-sidedly) as Question I in their petition for certiorari:

> Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States ... and (b) the claims arose from a massive accounting fraud perpetrated by American citizens....

Pet. i. That question makes no reference to jurisdiction of the subject matter. It correctly presumes—as did all parties and *amici* at the certiorari stage[1]—

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[1] *See* Br. in Opp. 11 n.7 ("These 'drive-by jurisdictional rulings' should have been rulings on the merits, but this makes no difference to the outcome here"; citation omitted); U.S. Cert. Br. 5-6 ("Although the court of appeals erred in treating the question as one of 'subject matter jurisdiction,' the court correctly concluded that petitioners' private suit could not go forward."); NASCAT Br. 9 ("This case presents an opportunity for the Court to clarify the reach of the United States securities laws at a time when many similar cases are at their inception."); *see also* Pet. Second Supp. Cert. Br. 8 n.1 (arguing that petitioners would "prevail" "in the Third, Eighth or Ninth Circuits" "under a jurisdiction or merits-based standard").

that the jurisdictional label used by the court of appeals made no difference to the outcome of this case.

The substantive extraterritoriality issue, and *not* the propriety of the jurisdictional label, is the question that the Court decided to hear. And it is that question, not the lower courts' casual use of the wrong label, that matters not just to the Nation, but to the world—as demonstrated by the 18 *amicus* merits briefs, including those of foreign sovereigns, that have been filed here.

b. Nothing in *Reed Elsevier* makes the jurisdictional label matter here. The jurisdictional label made a difference in *Reed Elsevier* because, to sustain their settlement, the parties were effectively asking the courts to allow them to waive the Copyright Act's registration requirement. If that requirement had been jurisdictional, as the Second Circuit held, then it would have been unwaivable, and the district court would have lacked power to approve the settlement. *Reed Elsevier*, slip op. at 4. But since the requirement was not jurisdictional, the settlement could be approved. *Id.* at 16.

Similar cases discussed in *Reed Elsevier*, slip op. at 5-7, and invoked by petitioners, Pet. Supp. Br. 1-4, also involved dispositive issues of waiver or forfeiture. For example, if the pre-arbitration conferencing requirement in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 594-96 (2009), had been jurisdictional, then the railroad's failure to timely raise it as a defense would not have been a waiver, and the NRAB's dismissal of the union's claims for failure to satisfy the conferencing requirement would have stood. But since the requirement was not jurisdictional, the board's order

had to be set aside. *Id.* at 599; *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11, 514 (2006) (waiver of Title VII's employee-numerosity requirement); *Kontrick v. Ryan*, 540 U.S. 443, 456-60 (2004) (forfeiture of right to rely on time limit for objection to bankruptcy discharge).

Petitioners make no suggestion of any waiver or forfeiture here, and they offer no argument as to how the Second Circuit's "drive-by jurisdictional ruling[]" otherwise affected the result. *Steel Co.*, 523 U.S. at 91. Under circumstances like these, where "nothing of substance" "*turned upon* whether [the legal issue] was technically jurisdictional," *ibid.* (emphasis in original), the Court is free to treat the lower court's jurisdictional ruling as a decision on the merits—which is what it really was—and to review it as such, *see Arbaugh*, 546 U.S. at 511-13 (discussing *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)).

That was exactly what the Court did, in fact, in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004). Both the district court and the D.C. Circuit in that case had mistakenly viewed the dispositive question under the antitrust laws as one of "subject matter jurisdiction."[2] Indeed, *all* of the decisions that created the circuit split in *Empagran* had made the same mistake.[3] That did not keep this

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[2] *Empagran S.A. v. F. Hoffmann-LaRoche Ltd.*, 315 F.3d 338, 343-57 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004); *accord Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, Civ. No. 00-1686 TFH, 2001 WL 761360, at *2-*4 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004).

[3] *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 421, 424-31 (5th Cir. 2001); and *Kruman v. Christie's*

Court from resolving the conflict and reviewing the case on the merits—and "ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); *see Empagran*, 542 U.S. at 163-75.

c. *Reed Elsevier* also did not dispense with an essential principle of appellate practice to which this Court has long adhered: "the decision of a lower court ... must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

In fact, this Court has applied this affirm-on-any-ground rule to the use of a drive-by jurisdictional label in an extraterritoriality case. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the lower court dismissed, for lack of subject-matter jurisdiction, a foreign seaman's Jones Act claims against respondent Compania Trasatlantica, the foreign owner of a foreign-flag vessel. *Id.* at 355-56, 358-59. The Court noted the misuse of the jurisdictional label, observing that, "'[a]s frequently happens ..., the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.'" *Id.* at 359 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951), *cited in Steel Co.*, 523 U.S. at 92). The Court then proceeded to decide the substantive extraterritoriality question on the merits anyway, and concluded that international choice-of-law

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Int'l PLC, 284 F.3d 384, 389-90 (2d Cir. 2002), both cited in *Empagran*, 542 U.S. at 160-61.

principles "preclude[d] the assertion of a claim under the Jones Act." *Id.* at 384. The Court "affirm[ed] the dismissal of petitioner's claims against Compania Trasatlantica," *ibid.*—just as it should affirm the dismissal here.

d. Nor do the GVR orders cited by petitioners support a remand. This is not a case in which "'(1) ... an intervening factor has arisen that has a legal bearing upon the decision, (2) ... clarification of the opinion below is needed to assure our jurisdiction, [or] (3) ... the respondent ... confesses error in the judgment below.'" Pet. Supp. Br. 3-4 (quoting *Lawrence v. Chater*, 516 U.S. 163, 191-92 (1996) (Scalia, J., dissenting)). And the GVRs cited by petitioners in support of remand in light of the Solicitor General's brief (*id.* at 4) are patently irrelevant: They were cases in which the Solicitor General, representing respondents and not *amici*, suggested at the certiorari stage that the cases be GVR'd.[4] Here, certiorari has already been granted, there is no intervening factor bearing upon the result reached below, and no issue as to the jurisdiction of this Court. And respondents—along with, among other *amici*, the United States, Australia, the United Kingdom, and France—all agree: "The judgment of the court of appeals should be affirmed." *E.g.*, U.S. Br. 34.

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[4] *See* Brief for the United States in Opposition, *Brown v. United States*, No. 02-8263 (U.S. filed Apr. 4, 2003) ("the Court may wish to remand this case to the Eleventh Circuit for further consideration in light of the position of the United States taken in this brief"); Brief for the Respondent in Opposition, *Jackson v. Massanari*, No. 00-9041 (U.S. filed June 20, 2001) ("the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand ... for further proceedings in light of the position taken by the Commissioner in this brief").

An order vacating and remanding for reconsideration in light of *Reed Elsevier* or the Solicitor General's brief would not only be unwarranted but also pointless. "The reason for" the affirm-on-any-ground

> rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.

Chenery, 318 U.S. at 88. Particularly pointless would be a remand that merely resulted—as would be likely here—in a decision by the Second Circuit removing the jurisdictional label but adhering to its extraterritoriality standard. That would simply leave for this Court to decide on another day, perhaps years hence, the real question in this case—whether that standard is valid. And until the Court finally addresses that question, a remand would work mischief. It would multiply proceedings involving claims that have been properly dismissed (but with the wrong label), and it could enable foreign-cubed plaintiffs in some cases to elude dismissal through artful pleading. Cases like this one should be dismissed at the threshold, through the application of a clear, simple, predictable rule that this Court can and should pronounce now. *See, e.g.*, Resp. Br. 52-55; IIB Br. 27-33; EADS Br. 33-35; France Br. 30-33; Law Profs. Br. 2-3, 21-29; SIFMA Br. 36-40; *cf. Hertz Corp. v. Friend*, No. 08-1107, slip op. at 15-16 (U.S. Feb. 23, 2010) (noting that "[p]redictability is valuable to corporations making business and investment decisions").

Finally, the wastefulness of a remand would be compounded here by the fact that this case has already been extensively briefed, including by deeply

interested foreign sovereigns, and is set to be argued presently. That the governments of the United States, Australia, the United Kingdom, France, and Switzerland unanimously agree, as the Swiss put it in their diplomatic note, that the petitioners' proposed application of Section 10(b) "would be inconsistent with established principles of international law,"[5] may well have made petitioners regret they filed a petition for certiorari. But such international unity provides a most compelling reason why the question presented in that petition should now be addressed by this Court.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[5] Embassy of Switzerland in the United States of America, Diplomatic Note to the United States Department of State, Note No. 17/2010 (Feb. 23, 2010), *reprinted in* ICC Br. App. 1a-4a; *accord* U.S. Br. 26-28; Aust'l Br. 23-38; U.K. Br. 33-37; France Br. 10-15, 17-33.

AMICUS CURIAE BRIEF

U.S.
FEB 26 2010

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FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BOX SECRY

QUESTION PRESENTED

Petitioners are foreign investors who alleged that respondents—an Australian company, its Florida-based subsidiary, and individual officers of the companies—engaged in a transnational securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). Petitioners alleged that they suffered injury after the Florida subsidiary provided false accounting figures to the foreign parent, the parent incorporated the false information into its own financial reports and other public statements, petitioners purchased stock in the parent on overseas exchanges at prices inflated by the misstatements, and the price of petitioners' stock fell when the misstatements were exposed. The question presented is as follows:

Whether the courts below correctly dismissed petitioners' private suit because of the attenuated link between petitioners' alleged injury and the United States component of the alleged fraud.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws. This case involves one of those laws, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act or Act), 15 U.S.C. 78j(b), and its implied private right of action. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage.

STATEMENT

1. Section 10(b) makes it unlawful for any person, through "interstate commerce," "the mails," or "any facility of any national securities exchange," "[t]o use or

employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of" rules prescribed by the SEC "in the public interest or for the protection of investors." 15 U.S.C. 78j(b). The Commission's Rule 10b-5 prohibits various deceptive acts and schemes in connection with the purchase or sale of securities. 17 C.F.R. 240.10b-5(b).

The Commission may bring enforcement actions to prevent and punish violations of Section 10(b). See 15 U.S.C. 78u(d)(1) and (3)(A). In addition, "[t]hough the text of the Securities Exchange Act does not provide for a private cause of action for § 10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). "In a typical § 10(b) private action a plaintiff must prove" both a substantive violation, *i.e.*, "(1) a material misrepresentation or omission by the defendant; (2) scienter; [and] (3) a connection between the misrepresentation or omission and the purchase or sale of a security"; and additional elements establishing a causal link between the violation and the plaintiff's injury, *i.e.*, "(4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Ibid.*

2. Respondent National Australia Bank Ltd. (NAB) is organized under the laws of Australia and is that country's largest bank. NAB's ordinary shares (the equivalent of common stock) trade on Australian and other foreign securities exchanges, but not on United States exchanges. In 1998, NAB acquired respondent HomeSide Lending, Inc. (HomeSide), located in Jacksonville, Florida. HomeSide was a mortgage service provider,

and its principal source of income was fees it received for servicing mortgages. The present value of those fees was calculated using an internal valuation model and booked by NAB on its balance sheet as an asset called Mortgage Servicing Rights (MSR). Pet. App. 2a-3a.

Petitioners filed this putative class action on behalf of non-U.S. shareholders of NAB who purchased its stock on foreign exchanges between April 1, 1999, and September 3, 2001. The complaint alleged that respondents, who include HomeSide, NAB, and individual officers and directors of the two companies, violated Section 10(b) and Rule 10b-5 by making false and misleading statements that inflated the price of NAB stock. Pet. App. 4a-5a.

Petitioners' complaint alleged that, between 1998 and 2001, HomeSide and its three principal officers (respondents Hugh Harris, Kevin Race, and W. Blake Wilson) deliberately overvalued HomeSide's mortgage portfolio by modifying assumptions that HomeSide used to produce the MSR valuations. The complaint further alleged that the HomeSide respondents generated the false valuations in the United States and then transmitted them to Australia, where they were incorporated into NAB's financials. Petitioners also alleged that the NAB respondents (NAB and its Chief Executive Officer, respondent Frank Cicutto) knew that HomeSide's MSR valuations were false but nevertheless incorporated them into NAB's public filings and statements. Pet. App. 4a, 9a, 25a-28a; J.A. 42a-46a, 89a-90a, 93a.

In July 2001, NAB announced that it would book a charge of $450 million because it was writing down the value of HomeSide's MSR. In response, the price of NAB's shares fell by more than 5%. In September 2001, NAB announced a further $1.75 billion writedown, and

its shares fell by nearly 13%. Petitioners alleged that they and other class members suffered economic loss as a result of the decline in value of NAB's stock. Pet. App. 3a-4a, 26a-27a; J.A. 70a, 72a-73a, 95a-96a.

3. The district court dismissed petitioners' suit. Pet. App. 23a-45a. As relevant here, the court held that it lacked subject-matter jurisdiction because the alleged fraud had an insufficient connection to the United States. *Id.* at 28a-42a. The court stated that "HomeSide's alleged conduct * * * amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 41a. The court observed that HomeSide's alleged deceptive conduct "would be immaterial to [petitioners'] Rule 10b-5 claim but-for (i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad." *Id.* at 41a-42a. The court concluded that, "[o]n balance, it is the foreign acts—not any domestic ones—that 'directly caused' the alleged harm here." *Id.* at 42a.

4. The court of appeals affirmed. Pet. App. 1a-22a. It observed that, in determining whether subject-matter jurisdiction exists over an alleged transnational securities fraud, the courts of appeals have considered both whether the alleged wrongful conduct had substantial effects on the United States and whether sufficient wrongful conduct occurred in the United States to warrant application of Section 10(b). *Id.* at 8a. The court explained that this case involves only the latter question because petitioners did not attempt to justify their suit based on effects on the United States. *Ibid.*; see *id.* at 20a.

The court of appeals further explained that, under its precedents, allegations of domestic conduct in furtherance of a transnational securities fraud are sufficient to establish subject-matter jurisdiction "only 'if the defendants' conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused'" the plaintiffs' losses. Pet. App. 11a (citation omitted). The court concluded that petitioners' allegations did not satisfy that test. *Id.* at 18a-22a.

The court of appeals described the critical issue as "what conduct comprises the heart of the alleged fraud." Pet. App. 18a. The court determined that the United States component did not comprise the heart of the fraud alleged by petitioners because "[t]he actions taken and the actions not taken by NAB in Australia were * * * significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a. The court further observed that "NAB, not HomeSide, is the publicly traded company and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world." *Ibid.*

The court of appeals also relied on the "lengthy chain of causation" between the alleged misconduct in the United States and petitioners' asserted injury. Pet. App. 21a. The court noted that petitioners "do not contend that HomeSide sent any falsified numbers directly to investors." *Ibid.* Rather, the court explained, "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass

through a number of checkpoints manned by NAB's Australian personnel before reaching investors." *Ibid.*

SUMMARY OF ARGUMENT

The courts below correctly dismissed petitioners' suit because the United States component of the alleged fraud did not directly cause their alleged injury.

A. Although the courts below reached the right result, they erred in treating the limits on Section 10(b)'s transnational application as constraints on their subject-matter jurisdiction. The statutory provisions that grant the federal courts jurisdiction over claims arising under Section 10(b) do not make that jurisdiction contingent on any link between the United States and the alleged fraudulent conduct. See 28 U.S.C. 1331; 15 U.S.C. 78aa. Instead, the restrictions on the transnational application of Section 10(b) derive from limits on the scope of the statutory prohibition and the associated private right of action.

B. A transnational securities fraud violates Section 10(b) if significant conduct material to the fraud's success occurs in the United States. That standard advances Section 10(b)'s goals of ensuring high ethical standards in the securities industry and protecting investors, and it conserves American judicial and law enforcement resources for regulation of conduct that presents substantial domestic concerns. A more restrictive standard for Section 10(b) coverage would risk permitting the United States to become a base for orchestrating securities frauds for export. That approach would erode ethical standards in the securities industry and undermine investor confidence, and it could lead to diminished protections for United States citizens targeted by foreign fraudsters. The "significant and material

conduct" standard also accords with the approach taken by the SEC in administrative adjudications, and it is therefore entitled to deference. Accordingly, when a transnational securities fraud involves significant and material conduct in the United States, Section 10(b) is violated, and the SEC can bring an enforcement action to redress that violation.

C. A statutory violation alone, however, does not entitle a private plaintiff to relief under Section 10(b)'s implied right of action. That right of action includes additional elements, most significantly a requirement that the plaintiff establish a direct causal link between the defendant's violation and his own economic injury. To satisfy that requirement in a suit alleging transnational securities fraud, the plaintiff should be required to prove that his injury was a direct result of the component of the fraud that occurred in the United States. A direct-injury requirement reduces the risk of conflict with foreign nations presented by application of Section 10(b)'s private remedy to multinational conduct, and it alleviates the danger that the resources of United States courts will be diverted to redress harms having only an attenuated connection to this country.

D. Under these standards, petitioners' suit was correctly dismissed. Petitioners alleged that false information was generated in the United States with the expectation that it would be transmitted to foreign investors abroad. The United States conduct did not directly cause petitioners' injury, however, because the false information reached investors only after it was deliberately incorporated by persons acting abroad into financial statements issued abroad. Accordingly, petitioners failed to state a valid claim for relief.

ARGUMENT

PETITIONERS FAILED TO STATE A VALID CLAIM FOR RELIEF BECAUSE THE UNITED STATES COMPONENT OF THE ALLEGED FRAUD DID NOT DIRECTLY CAUSE THEIR ALLEGED INJURY

Although its reasoning was flawed, the court of appeals was correct in its ultimate conclusion that petitioners' suit cannot go forward. Contrary to the court of appeals' view, the constraints on Section 10(b)'s transnational application do not limit the subject-matter jurisdiction of the federal courts. Rather, those constraints are potentially relevant to two non-jurisdictional questions: whether particular fraudulent conduct is subject to Section 10(b)'s substantive prohibition and whether a particular private plaintiff can invoke Section 10(b)'s implied private right of action.

The court of appeals was also mistaken in suggesting that a securities fraud must involve predominantly domestic conduct in order to violate Section 10(b). Under the correct legal standard, Section 10(b) is violated whenever a securities fraud includes significant conduct in the United States that is material to the fraud's success. The fraud alleged in this case therefore violated Section 10(b), and the SEC could have brought an enforcement action to redress it.

Private actions under Section 10(b), however, are subject to additional constraints because they present concerns that government actions do not. Those concerns are particularly acute in private suits alleging multinational securities frauds, which can create conflict with foreign nations and misdirect the scarce resources of the federal courts towards resolution of primarily foreign disputes. To mitigate those concerns, a private

plaintiff should be required to establish a direct link between his injury from a securities fraud and the United States component of the fraud. Because petitioners did not allege that direct link, they failed to state a valid claim for relief, and their suit was correctly dismissed.

A. Limits On Section 10(b)'s Transnational Application Are Not Jurisdictional

Like every other court of appeals that has addressed the issue, the court below characterized the issue of Section 10(b)'s transnational application as one of "subject matter jurisdiction." Pet. App. 22a. As both petitioners (Br. 15-18) and respondents (Br. 21-22) agree, that characterization was mistaken. The connection between an alleged securities fraud and the United States does not affect the federal courts' subject-matter jurisdiction. Rather, that connection bears on whether Section 10(b) applies to the securities fraud at issue and whether a particular private plaintiff can invoke Section 10(b)'s implied private right of action.

1. As this Court has explained, "[j]urisdiction" "is a word of many, too many, meanings." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510 (2006) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). In particular, in federal-question cases, courts have sometimes conflated subject-matter jurisdiction with "a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief." *Id.* at 511 (citation omitted). The determination whether the defendant's conduct is governed by the law on which the plaintiff bases his claim for relief is generally a merits-related decision about whether the plaintiff has "state[d] a claim upon which relief can be granted," Fed. R. Civ.

P. 12(b)(6), rather than a determination about whether the federal courts have "subject-matter jurisdiction," Fed. R. Civ. P. 12(b)(1). See *Steel Co.*, 523 U.S. at 89; *Bell* v. *Hood*, 327 U.S. 678, 682 (1946).

2. In *Arbaugh*, this Court announced a general rule that "a threshold limitation on a statute's scope shall count as jurisdictional" only when "the Legislature clearly states" that it has that character. 546 U.S. at 515. In contrast, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional." *Id.* at 516. Applying that test, the Court concluded that the restriction on the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to employers who have at least 15 employees is a constraint on "a plaintiff's claim for relief, not a jurisdictional issue." *Arbaugh*, 546 U.S. at 516. The Court explained that the statutory provisions governing federal-court jurisdiction over Title VII claims do not contain a 15-employee threshold. *Id.* at 515 (citing 28 U.S.C. 1331 and 42 U.S.C. 2000e-5(f)(3)). Instead, that limitation appears "in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Ibid.* (citation omitted).

Under the *Arbaugh* test, limits on the transnational application of Section 10(b) are not jurisdictional. In 28 U.S.C. 1331, Congress granted the federal courts broad jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," and Section 10(b) is a law of the United States. The Exchange Act does not limit that broad grant of jurisdiction. Instead, the Act makes clear that federal-court jurisdiction over claims arising under the Act is "exclusive" and extends to "*all* suits in equity and actions at

law brought to enforce *any* liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. 78aa (emphases added). Thus, neither 28 U.S.C. 1331, 15 U.S.C. 78aa, nor any other provision of the Exchange Act restricts the federal courts' subject-matter jurisdiction over a Section 10(b) claim based on whether the alleged violation occurred in the United States. To be sure, the location of alleged fraudulent conduct may bear on whether a Section 10(b) violation has occurred and whether the plaintiff is entitled to invoke the implied private right of action. See pp. 13-30, *infra*. But if a particular suit is otherwise an appropriate means of enforcing a "liability or duty" created by the Exchange Act or rules promulgated thereunder, Sections 1331 and 78aa unambiguously vest the federal courts with jurisdiction to resolve it.

Classifying the limits on Section 10(b)'s transnational application as non-jurisdictional also accords with this Court's treatment of restrictions on the extraterritorial reach of other statutes. This Court has held, for example, that limits on the extraterritorial application of the Jones Act, 46 U.S.C. 30104, affect only whether particular plaintiffs have "state[d] a cause of action" and do not call into question the jurisdiction of the federal courts. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959) (citation omitted); *Lauritzen* v. *Larsen*, 345 U.S. 571, 574-575 (1953). More recently, in *Arbaugh*, the Court disavowed its prior suggestion in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) (*Aramco*), that the limits on the extraterritorial application of Title VII are restrictions on federal-court jurisdiction. 546 U.S. at 512-513.

3. Mislabeling as jurisdictional limits on the scope of federal statutes and the rights of action they provide has

substantial costs. An objection that the federal courts lack subject-matter jurisdiction may be raised at any stage in the litigation, even after trial and entry of judgment. *Arbaugh*, 546 U.S. at 506. Furthermore, a court must consider potential jurisdictional defects on its own initiative even if they have not been identified by the parties. *Ibid.* In contrast, an objection that a complaint fails to state a valid claim for relief is forfeited if not raised by the opposing party before trial on the merits. *Id.* at 507. Recognizing that limits on the transnational application of Section 10(b) are non-jurisdictional therefore avoids "unfairness and waste of judicial resources." *Id.* at 515 (brackets, quotation marks, and citation omitted).

Correctly classifying the limits on Section 10(b)'s transnational application also enables the Court to distinguish between limits on Section 10(b)'s substantive prohibition and additional limits that constrain only the implied private right of action. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172 (1994) (explaining that "the scope of conduct prohibited by § 10(b)" and "the elements of the 10b-5 private liability scheme" present distinct questions). Distinguishing between limits on the statutory prohibition and limits on the private right of action is important because the SEC's enforcement activities are not limited by the additional constraints that apply to private suits. Unlike private plaintiffs, who must prove reliance and loss as elements of their actions, see p. 26, *infra*, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investors to lose money, *SEC* v. *Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). Under the statutory provisions that govern SEC en-

forcement actions, "[w]henever it shall appear to the Commission that any person has violated any provision of [the Exchange Act], * * * the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation." 15 U.S.C. 78u(d)(3)(A). The SEC has similarly broad and unqualified authority to bring an action for injunctive relief "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of [the Act]." 15 U.S.C. 78u(d)(1). Thus, whenever a securities fraud is sufficiently connected to the United States to bring it within Section 10(b)'s substantive prohibition, the Commission may pursue an enforcement action.

B. A Transnational Securities Fraud Violates Section 10(b) If Significant Conduct Material To Its Success Occurs In The United States

1. The text of Section 10(b) sheds little light on when a transnational securities fraud falls within the statute's substantive prohibition. See *Itoba Ltd.* v. *Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995), cert. denied, 516 U.S. 1044 (1996). Section 10(b) makes it unlawful for any person, through "interstate commerce," "the mails," or "any facility of any national securities exchange," "[t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance." 15 U.S.C. 78j(b). The statute does not describe the extent to which the prohibited conduct must occur within or affect the United States.

Language in Section 10(b) and other Exchange Act provisions indicates that the statute has at least some

application to conduct that occurs in part outside the United States. First, Section 10(b) refers to "interstate commerce," and the Exchange Act defines that term to include "trade, commerce, transportation, or communication * * * between any foreign country and any State." 15 U.S.C. 78c(a)(17). Second, in describing the Exchange Act's purposes, Congress stressed that securities transactions are affected by information and trading that crosses national boundaries. 15 U.S.C. 78b(2) (observing that prices of transactions on United States securities markets are "disseminated and quoted" and "constitute a basis for determining" securities prices in "foreign countries"). Finally, Section 30(b) of the Act exempts from regulation foreign brokers, dealers, and banks conducting transactions abroad unless the Commission determines that regulating them is necessary to prevent evasion of the Act. 15 U.S.C. 78dd(b); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 208 (2d Cir.), rev'd in part on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). That exemption would have no function if the Act did not apply in the first instance to securities transactions that occur abroad.[1] Although these provisions suggest that the

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[1] Contrary to respondents' contention, Section 30(b) does not "specifically restrict[] the Act to the transaction of business *within* the United States." Resp. Br. 30 (citation omitted). Rather, it specifically exempts from the Act certain business transacted *outside* the United States, thereby suggesting that the Act would otherwise cover that business. The inference that respondents would draw from Section 30(a) is likewise incorrect. That provision authorizes the SEC to regulate certain transactions conducted abroad by foreign brokers and dealers, even if they do not involve significant and material conduct in the United States. 15 U.S.C. 78dd(a). It therefore does not imply that Section 10(b) or any other provision of the Exchange Act is inapplicable when significant and material conduct occurs within this country.

Exchange Act has at least some transnational application, they do not delineate that transnational scope. *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 664-665 (7th Cir. 1998), cert. denied, 525 U.S. 1114 (1999).

In the absence of clear textual guidance, the courts of appeals have sought to ascertain Section 10(b)'s transnational reach by considering whether, in light of the statute's purposes, "Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to" policing conduct with an international component. *Europe & Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (citation omitted), cert. denied, 525 U.S. 1139 (1999). The courts have uniformly agreed that Section 10(b) can apply to a transnational securities fraud either when fraudulent conduct has effects in the United States or when sufficient conduct relevant to the fraud occurs in the United States. See, *e.g.*, *Kauthar*, 149 F.3d at 665; *Alfadda* v. *Fenn*, 935 F.2d 475, 478 (2d Cir.), cert. denied, 502 U.S. 1005 (1991); *SEC* v. *Kasser*, 548 F.2d 109, 112-113 (3d Cir.), cert. denied, 431 U.S. 938 (1977).[2] Although the courts broadly agree that domestic conduct can be significant enough to trigger coverage under Section 10(b) even when the effects of the fraud are felt elsewhere, they have not been entirely uniform in their view about how much domestic conduct is necessary. See *Kauthar*, 149 F.3d at 665-666; *Robinson* v. *TCI/US W. Cable Commc'ns, Inc.*, 117 F.3d 900, 906 (5th Cir. 1997).

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[2] As the court of appeals noted (Pet. App. 8a), this case does not present a question about when effects on the United States are sufficient to bring a transnational fraud within Section 10(b). In the court below, petitioners based their right to proceed solely on the fraudulent conduct that occurred within the United States. *Ibid.*

In the view of the United States, a transnational securities fraud violates Section 10(b) when the fraud involves significant conduct in the United States that is material to the fraud's success. Under that standard, the United States conduct must comprise a significant amount of the conduct constituting a violation and must be integral, rather than ancillary, to the fraud. For example, Section 10(b) would apply when misrepresentations are made in the United States, *e.g.*, *Grunenthal GmbH* v. *Hotz*, 712 F.2d 421, 426 (9th Cir. 1983), when the fraud is masterminded from the United States, *e.g.*, *SEC* v. *Berger*, 322 F.3d 187, 195 (2d Cir. 2003), or when the transaction that consummates the fraud takes place on United States markets, *e.g.*, *Psimenos* v. *E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983). But Section 10(b) would not apply when all that occurs in the United States are meetings or communications that are incidental to the fraud. *E.g.*, *Banque Paribas London*, 147 F.3d at 131.

This standard strikes the appropriate balance between advancing Section 10(b)'s goals and conserving the limited resources of United States courts and law enforcement agencies for regulation of securities-related conduct that has a substantial connection to the United States. A principal purpose of Section 10(b) is "to achieve a high standard of business ethics in the securities industry," *Basic Inc.* v. *Levinson*, 485 U.S. 224, 234 (1988) (citation omitted), in order "to insure honest securities markets and thereby promote investor confidence," *United States* v. *O'Hagan*, 521 U.S. 642, 658 (1997). Interpreting Section 10(b) to prohibit frauds involving significant and material conduct in the United States furthers those goals. It ensures that the United States does not become a "'Barbary Coast,' as it were,

harboring international securities 'pirates,'" *Kasser*, 548 F.2d at 116, who use this country "as a base for manufacturing fraudulent security devices for export," *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, J.). If individuals in the United States could peddle frauds to foreign victims with impunity, ethical standards in the United States securities industry would decline, and investors both abroad and at home would lose confidence in our securities markets. *Grunenthal*, 712 F.2d at 425.

Applying Section 10(b) to securities frauds with a significant and material domestic component also advances another important purpose of Section 10(b)—protecting United States investors against fraud. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983). Even if a fraud is currently directed at overseas investors, the danger always exists that the wrongdoers will begin targeting domestic investors. In addition, if the United States interprets its securities laws to prohibit fraudulent domestic conduct that injures overseas investors, other countries are more likely to offer comparable protection to American investors. *Kasser*, 548 F.2d at 116. In contrast, if the United States does not prevent domestic fraudsters from targeting foreign victims, other "countries might decline to act against individuals and corporations seeking to transport securities frauds to the United States," and those foreign wrongdoers may sometimes be outside the jurisdiction of our courts. *Ibid.*

Limiting Section 10(b) to frauds involving significant and material conduct in the United States ensures that the statute does not "have a global reach when the domestic conduct is insubstantial or the domestic impact is too generalized or insignificant." *Continental Grain*

(Austl.) Pty. Ltd. v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979). That preserves American judicial and law-enforcement resources for conduct that is a legitimate domestic concern. See *Banque Paribas London*, 147 F.3d at 125. And it avoids international friction that might result if the United States attempted to apply its laws to securities-related conduct that has little relationship to this country. Cf. *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

The "significant and material conduct" requirement also accords with the interpretation applied by the Commission in administrative adjudications. See, *e.g.*, *United States Sec. Clearing Corp.*, 52 S.E.C. 92, 95 n.14 (1994) (citing *Grunenthal* for the proposition that the securities laws applied to a fraud where "conduct in the United States was material and significant"); *Robert F. Lynch*, Exchange Act Release No. 11,737, 8 S.E.C. Docket (CCH) 75, 76-77 (Oct. 15, 1975) (finding that antifraud provisions, including Section 10(b), applied to a securities fraud where "necessary and substantial" acts occurred in the United States). The SEC's reasonable interpretation of Section 10(b)'s scope is entitled to deference. See *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002).

2. The court below did not inquire whether the fraud alleged by petitioners involved significant and material conduct in the United States. Instead, the court stated that the critical issue was "what conduct comprise[d] the heart of the alleged fraud," Pet. App. 18a, and it concluded that petitioners' suit was correctly dismissed because the conduct in Australia was "significantly more central to the fraud" than the misrepresentations in the United States, *id.* at 19a. That analysis, under which Section 10(b) would cover only transnational frauds in which domestic conduct predominates, is erroneous.

The increasing integration of the world's securities markets has expanded legitimate investment and capital-raising opportunities, but it has also created greater potential for transnational securities frauds. Because those frauds often "involve multiple components, participants and events centered in several countries," cases are increasingly likely to arise in which no single country can meaningfully be described as the "heart" of the fraud. *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 372 (S.D.N.Y. 2005). Thus, if all countries interpreted their securities laws in accordance with the "heart of the fraud" approach, the perpetrators of many transnational frauds could not be held accountable in any jurisdiction.

In addition, limiting Section 10(b)'s coverage to transnational frauds in which domestic conduct predominates would not adequately protect the government's law-enforcement interests. As described above, the United States may have a substantial interest in preventing the use of this country as a location for even a relatively small part of an international fraud if the domestic conduct is significant and integral to the fraud.

A "heart of the fraud" analysis finds some support in the Restatement (Third) of the Foreign Relations Law of the United States § 416(1)(d) at 296 (1987) (Foreign Relations Law Restatement), which states that the United States may prescribe law governing "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." Other provisions, however, suggest that the United States may also prescribe law governing conduct related to transnational securities fraud in other situations. Section 402(1)(a) states that a nation may prescribe law governing conduct that takes place "in substantial part" within its ter-

ritory unless doing so would be unreasonable. *Id.* § 402(1)(a) at 237. Section 403 lists various factors that guide the reasonableness inquiry, including the link between the regulated activity and the regulating nation, the character of the activity, the degree of international consensus on the need for regulation, the importance of regulation to the international economic system, and the likelihood of conflict with regulation by another country. *Id.* § 403(2), at 244. Those factors suggest that United States regulation of transnational securities frauds is reasonable when significant and material conduct occurs in this country.

In that situation, the fraud has a substantial link to the United States. In addition, the United States has a particularly strong interest "in punishing fraudulent or manipulative conduct" connected to its territory. Foreign Relations Law Restatement § 416 cmt. a at 297. Moreover, there is broad international consensus that regulation of securities fraud is necessary and important to the international economic system, and such regulation generally "has not resulted in state-to-state conflict." *Id.* reporter's note 3, at 301. See Louis Loss & Joel Seligman, *Securities Regulation* 5115 (1996 rev. ed.) (Loss); *IIT* v. *Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980) (Friendly, J.).

The conclusion that domestic conduct need not predominate for United States law to apply is also supported by the Federal Securities Code (Code), the relevant provisions of which were drafted as "a restatement of existing law." Loss 5101. The Code indicates that United States securities laws apply to prohibited conduct whenever the "constituent elements occur to a significant (but not necessarily predominant) extent within

the United States." American Law Inst., Federal Securities Code § 1905(a)(1)(D) at 981 (1980).[3]

3. Respondents' suggestion (*e.g.*, Br. 20-21, 44) that Section 10(b) should apply only when a securities transaction occurs in the United States would be even more problematic than the court of appeals' "heart of the fraud" approach. To begin with, Section 10(b) can be violated even if no securities transaction actually occurs. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 84 (2006) (explaining that the purchaser-seller requirement of *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), limits only the private right of action and is not required by Section 10(b)'s "in connection with" requirement); *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (holding that, when a securities fraud involves public dissemination of a misrepresentation, "the 'in connection with' requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation"). Under respondents' approach, moreover, Section 10(b) would not apply to a fraud that was hatched and executed entirely in the United States and that injured domestic investors if the transactions induced by the fraud were executed abroad. But Section 10(b) would apply to a fraud even if its only connection to the United States was that the injured foreign investor happened to be here when the fraudulent transaction was consum-

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[3] The D.C. Circuit's view that *all* constituent elements of a Section 10(b) violation must occur in the United States for the prohibition to apply, see *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 31 (1987), presents even more problems for effective law enforcement than the "heart of the fraud" approach. Moreover, the *Zoelsch* standard is inconsistent with the Foreign Relations Law Restatement, the Code, and the approach of every other court of appeals.

mated. Congress could not have intended the statute's scope to vary in that arbitrary manner, which bears no relation to the purposes that Congress sought to achieve.

4. Respondents suggest (Br. 23-39) that Section 10(b)'s application to transnational securities frauds must be narrowly construed because of the principle "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Aramco*, 499 U.S. at 248 (citation omitted). That interpretive rule provides a sound basis for concluding that Section 10(b) does not apply when a securities fraud with no effects in the United States is hatched and executed entirely outside this country. But when a securities fraud is executed in part through domestic conduct, the presumption against extraterritoriality does not identify the type or amount of domestic conduct necessary to bring the fraud within the reach of Section 10(b).

In particular, the presumption does not preclude application of Section 10(b) to securities frauds that involve significant and material conduct in the United States. Applying Section 10(b) to those frauds is not accurately viewed as extraterritorial because it involves regulation of essentially domestic conduct. See *Environmental Def. Fund, Inc.* v. *Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (Friendly, J.).

Thus, in *Pasquantino* v. *United States*, 544 U.S. 349 (2005), this Court concluded that the presumption against extraterritoriality was not implicated by application of the federal wire-fraud prohibition to a scheme to use domestic interstate communications to defraud Can-

ada of tax revenue. That application of the statute, the Court explained, did not give the law "extraterritorial effect," because the government was punishing the "domestic element of [the defendants'] conduct." *Id.* at 371 (citation omitted). Similarly, in numerous other cases, the Court has interpreted various federal statutes to apply to conduct that occurred in part abroad because significant conduct occurred in the United States. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *Thomsen* v. *Cayser*, 243 U.S. 66, 88 (1917); *United States* v. *Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105-106 (1913).

The rationales underlying the presumption against extraterritoriality also support the conclusion that it is not implicated by application of Section 10(b) to frauds involving significant and material conduct within the United States. The presumption "serves to protect against unintended clashes between our laws and those of other nations." *Aramco*, 499 U.S. at 248. But application of the substantive prohibitions of United States securities laws to transnational frauds with a significant domestic component generally has not resulted in international conflict. See p. 20, *supra*. The presumption also reflects "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U.S. 197, 204 n.5 (1993). But securities frauds with a significant domestic component present important domestic concerns because they may undermine ethical standards in the securities industry, investor confidence, and protections for domestic investors. See pp. 16-17, *supra*.

Contrary to respondents' suggestion (Br. 33-34), neither *Aramco*, *Foley Brothers* v. *Filardo*, 336 U.S. 281 (1949), nor *New York Central Railroad* v. *Chisholm*, 268 U.S. 29 (1925), suggests that the presumption against extraterritoriality precludes applying Section 10(b) to transnational frauds with a significant domestic component. None of those cases involved significant conduct in the United States material to the alleged violations. See *Aramco*, 499 U.S. at 247 (Title VII claim based on alleged discrimination occurring in Saudi Arabia); *Filardo*, 336 U.S. at 283 (alleged violation of Eight Hour Law, 40 U.S.C. 321 *et seq.* (1940), based on work performed in Iraq and Iran); *Chisholm*, 268 U.S. at 30 (claim under Federal Employers' Liability Act, ch. 149, 35 Stat. 65, based on negligence that allegedly occurred in Canada). Respondents' reliance (Br. 34-36) on *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007), is likewise misplaced. Unlike Section 10(b), the patent laws contain express limits on their application to transnational conduct. See *id.* at 455 (quoting 35 U.S.C. 154(a)(1)). The Court's conclusions about the scope of the patent statutes and the role of the presumption against extraterritoriality in determining that scope are therefore not relevant to the interpretation of Section 10(b).

Respondents are also wrong in contending (Br. 39-44) that applying Section 10(b) to transnational frauds with a significant domestic component would violate the principle that statutes should not be construed in a way that would violate international law. As discussed above, the Foreign Relations Law Restatement indicates that the United States has authority under international law to prescribe law governing securities frauds that involve significant and material conduct in the United States. See pp. 19-20, *supra*. The Restatement

(First) of Conflict of Laws, which was issued contemporaneously with the enactment of the Exchange Act, also supports that conclusion. Restatement (First) of Conflict of Laws § 65, at 97-98 (1934) (Conflicts Law Restatement) ("If consequences of an act done in one state occur in another state, each state in which any event in the series of acts and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof."). The choice-of-law rules on which respondents rely (Br. 42-44) do not suggest otherwise. They apply when "more than one state has legislative jurisdiction" to prescribe law governing a particular wrong, and they indicate only how "the court at the forum" where a suit is brought should "select the law" to apply from among the laws "of the several states thus having legislative jurisdiction." Conflicts Law Restatement cmt. b at 98; see *id.* § 377 cmt. a at 454.

C. A Private Plaintiff May Obtain Redress For A Transnational Securities Fraud Only If The United States Component Of The Fraud Directly Caused His Injury

1. Although Section 10(b) encompasses transnational securities frauds that involve significant conduct in the United States material to the frauds' success, a private plaintiff cannot obtain relief simply by demonstrating that a violation has occurred. Section 10(b)'s implied private right of action also includes additional elements. See *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). Because Congress did not explicitly create the right of action, primary responsibility for delineating those additional elements lies with the courts, guided by available evidence of the restrictions Congress would have im-

posed if it had enacted an express cause of action. *Central Bank*, 511 U.S. at 173.

Applying that analysis, this Court has held that a private plaintiff must prove that he relied on the defendant's misrepresentations. *Basic Inc.*, 485 U.S. at 243. A private plaintiff must also prove that he suffered a loss and that the defendant's fraud was the proximate cause of that loss. See *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005). These requirements effectively demand that the plaintiff establish a direct causal link between the defendant's violation and his own economic injury. In applying those principles to cases involving transnational frauds, this Court should require a private plaintiff to establish not simply that his loss resulted from the fraudulent scheme as a whole, but that the loss resulted directly from the component of the fraud that occurred in the United States.

"[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. As described above, application of the substantive federal antifraud provisions to transnational securities frauds usually will not interfere with comity among different nations because there is broad international consensus about the need for securities regulation. See p. 20, *supra*. In addition, SEC enforcement actions are unlikely to produce conflict with foreign nations because the Commission routinely works with its overseas counterparts to develop coordinated approaches to enforcement. See 15 U.S.C. 78u(a)(2); Loss 5118-5122.[4]

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[4] For example, the SEC has entered into bilateral memoranda of understanding on information-sharing and enforcement cooperation (MOUs) with its counterparts in more than 20 different countries,

Private securities actions, in contrast, present a significant risk of conflict with foreign nations because the United States affords private plaintiffs litigation procedures and remedies that other countries often do not provide. For example, unlike many other countries, the United States permits securities class actions and use of the fraud-on-the-market theory to establish reliance in those actions. See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 61-64 (2007). Other nations may perceive our affording a private remedy to foreign plaintiffs as circumventing the (often more limited) causes of action and remedies that those nations provide their own citizens, particularly when a plaintiff's principal grievance is with foreign conduct or entities. See *Empagran*, 542 U.S. at 167 (noting that disagreements over remedies can be a source of international discord). Requiring private plaintiffs to establish that their losses were a direct result of conduct in the United States mitigates that risk by limiting the availability of United States remedies to situations in which domestic conduct is closely linked to the plaintiff's grievance.[5]

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including Australia, and is a signatory, along with more than 60 other securities regulators, to a multilateral MOU.

[5] Requiring proof that the plaintiff's injury resulted directly from conduct within the United States also alleviates the danger that Section 10(b) litigation will impede international commerce. If private actions could go forward based on an attenuated connection between United States conduct and the plaintiff's loss, the costs of doing business in the United States would increase, not only damaging domestic businesses, but also deterring "[o]verseas firms with no other exposure to our securities laws * * * from doing business here." *Stoneridge*, 552 U.S. at 164.

A direct-injury requirement also alleviates the danger that the resources of United States courts will be diverted to redress securities-related harms having only an attenuated connection to this country. See *Banque Paribas London*, 147 F.3d at 125. As a federal law-enforcement agency, the SEC can be expected to take account of national interests when it determines whether particular enforcement suits represent sound uses of its resources and the resources of the federal courts. The overarching concern of individual plaintiffs, in contrast, is redressing their own injuries. In deciding whether to take legal action, such plaintiffs have little incentive to consider whether resolution of their securities-related grievances represents a wise use of federal judicial resources. Cf. *Empagran*, 542 U.S. at 171 (suggesting that private plaintiffs have less authority than the government to pursue antitrust actions seeking redress for foreign injury).

2. Contrary to petitioners' contention (Br. 44-45), a direct-injury requirement is consistent with this Court's statement in *Stoneridge* that, in enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, § 101(b), 109 Stat. 743, Congress "ratified the implied right of action," accepting it "as then defined but cho[osing] to extend it no further." 552 U.S. at 165-166. When the PSLRA was enacted, this Court had already held that reliance is a required element of a private action, see *Basic Inc.*, 485 U.S. at 243, and the PSLRA itself codified the injury and loss-causation requirements that had been adopted by many lower courts, 15 U.S.C. 78u-4(b). Moreover, every court of appeals that had addressed the transnational application of Section 10(b) before enactment of the PSLRA had held that a plaintiff must establish that conduct within

the United States "directly caused" his injury. See *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987); *Psimenos*, 722 F.2d at 1046; *Grunenthal*, 712 F.2d at 424-425; *Continental Grain*, 592 F.2d at 420. Thus, the private right of action ratified by the PSLRA included a direct-injury requirement.[6] And, although the Court in *Stoneridge* acknowledged that Congress had ratified the Section 10(b) private right of action as it had developed up to that point, the Court also observed that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." 552 U.S. at 165.

Petitioners also argue (Br. 43-44) that the Court should not consider whether private plaintiffs must prove a direct injury because that argument was not pressed or passed on below. Petitioners are mistaken. The court of appeals held that petitioners' action could proceed only if "particular acts or culpable failures to act within the United States directly caused" petitioners' losses. Pet. App. 11a (citation omitted). And in concluding that dismissal of petitioners' suit was appropriate, the court relied in part on "the lengthy chain of causation between the American contribution" to the fraud and "the harm to" petitioners. *Id.* at 21a. The court

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[6] To be sure, the courts had not clearly articulated the bounds of that requirement and had sometimes conflated it with the need for significant and material conduct in the United States. See, *e.g.*, *Continental Grain*, 592 F.2d at 420. Moreover, no court had addressed whether the direct-injury requirement applies only to private plaintiffs or also to SEC actions. See *Zoelsch*, 824 F.2d at 33 n.3 (reserving question); *Kasser*, 548 F.2d at 115 (finding direct causation in SEC action without discussing whether finding was required). Nonetheless, because every court of appeals that had addressed the issue had articulated some kind of direct-causation requirement, Congress cannot reasonably be understood to have rejected that requirement by enacting the PSLRA.

below did not address whether the direct-injury requirement applies only to private actions or instead applies more generally. But the court had no occasion to reach that question because it was bound by Second Circuit precedent that had already held, based on the mistaken view that the limits on Section 10(b)'s transnational application are constraints on the courts' subject-matter jurisdiction, that the same limitations apply to both private and SEC enforcement actions. See *Berger*, 322 F.3d at 193.[7]

D. Petitioners Failed To State A Valid Claim Because The United States Component Of The Alleged Fraud Did Not Directly Cause Their Alleged Injury

Under the standards articulated above, the court of appeals correctly upheld the dismissal of petitioners' lawsuit.

1. Petitioners stated a violation of Section 10(b) because they alleged that significant conduct material to the fraud occurred in the United States. According to their complaint, the false information that NAB released to the public in Australia was generated by HomeSide and its officers in the United States with the expectation that it would be incorporated into NAB's financial statements. J.A. 43a-44a, 45a-46a, 82a-83a, 93a. The conduct within the United States thus was not peripheral or

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[7] For similar reasons, petitioners are also wrong in faulting the SEC (Br. 43-44) for not arguing below that petitioners' private suit should have been dismissed based on the direct-injury requirement. The Commission made clear that its brief was premised on acceptance of existing Second Circuit precedent, Pet. App. 55a n.2, including that court's holding in *Berger* that private suits and SEC enforcement actions are subject to the same limitations, *id.* at 49a. The Commission therefore had no occasion to discuss the distinct requirements that apply to private plaintiffs who invoke the implied right of action.

merely preparatory but was integral to the overall fraud. Accordingly, the fraud had a sufficient connection to the United States to fall within Section 10(b)'s substantive prohibition, and the SEC could have pursued an enforcement action based on the facts as alleged. To the extent the court of appeals concluded otherwise, that conclusion was incorrect.

2. Nonetheless, the court of appeals' judgment affirming the dismissal of petitioners' suit was correct because the component of the alleged fraud that occurred in the United States was not a direct cause of petitioners' alleged injury. As the court of appeals explained, "while HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." Pet. App. 21a. In allegedly incorporating the false numbers into NAB's financial reports and other public statements, NAB personnel were not acting under the direction and control of HomeSide, but rather were exercising independent judgment as officers of HomeSide's parent corporation. Petitioners' allegations thus posit a "lengthy chain of causation between what HomeSide did and the harm to investors," *ibid.*, and that causal chain includes significant intermediate events outside this country, including the inflation of the stock price in the Australian trading market. The indirectness of the link between the actions in Florida and petitioners' injuries does not negate the existence of a Section 10(b) violation, but it prevents petitioners from stating a claim upon which relief can be granted, and it thus provides a sound basis for dismissing their private suit.

3. Petitioners present two challenges to the conclusion that they have not satisfied the direct-injury requirement. Neither challenge has merit.

First, petitioners contend (Br. 7 & n.4, 30) that the record does not support the conclusion that the false information generated in the United States passed through checkpoints manned by NAB personnel in Australia before reaching investors. That contention is incorrect. Although petitioners describe their complaint as alleging that NAB "mechanically incorporated" the HomeSide numbers (Br. 30 (citing C.A. App. 1455)), the complaint contains no such allegation, either on the page that petitioners cite or elsewhere. On the contrary, the complaint alleges that both Cicutto (NAB's Chief Executive Officer) and NAB "knew" that the financial information incorporated into NAB's reports was "materially false," and that they "knowingly and substantially participated or acquiesced in the issuance" of that information. J.A. 93a; see J.A. 42a-46a, 89a-90a. The complaint also alleges that Cicutto "had a duty" to ensure that statements made by NAB about its financial condition were not "materially misleading or untrue." J.A. 44a-45a. And NAB's annual reports, referenced in the complaint (J.A. 62a), stated that the consolidated results reported by NAB were "based on the operating segments as reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior management." Supp. J.A. 39.

Second, petitioners contend (Br. 30-31) that they alleged a direct causal connection between conduct in the United States and their asserted injury because, under traditional principles of tort law, HomeSide's conduct was the proximate cause of that injury. That con-

tention is also mistaken. Although the common law sometimes provides guidance in construing the causation requirements in private Section 10(b) actions, this Court has made clear that common-law principles cannot be mechanically incorporated into that analysis. *Stoneridge*, 552 U.S. at 162; *Basic Inc.*, 485 U.S. at 243-244. The proximate-cause inquiry under common law, including the rules about intervening causes invoked by petitioners (Br. 30), are designed to determine whether a particular defendant should be held legally accountable for the plaintiff's injury. See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42, at 273 (5th ed. 1984). The question here, however, is not whether a particular actor bears enough responsibility for petitioners' injury to be held legally accountable, but whether conduct that occurred in the United States is so closely connected to that injury for United States law to provide a cause of action. Rules developed to guide the actor-based proximate-cause inquiry do not provide the answer to that question. Instead, the answer turns on where the conduct most directly responsible for petitioners' injury occurred. Because that conduct occurred in Australia, the United States securities laws do not afford petitioners a cause of action.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE ALECTA PENSIONSFÖRSÄKRING, ÖMSESIDIGT, AMPEGAGERLING INVESTMENT GMBH, APG ALGEMENE PENSIOEN GROEP N.V., ATP - ARBEJDSMARKEDETS

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INTEREST OF AMICI CURIAE[1]

This *amici* brief is filed on behalf of a group of institutional investors from outside of the United States, including a number of pension funds that invest for the long-term security of their millions of active and retired members. Collectively, *amici* have approximately 1.9 trillion U.S. dollars in assets under management, a significant amount of which they invest in securities sold in American and foreign markets. *Amici* include some of the largest institutional investors in the world and have a strong interest in maintaining the right to assert federal securities fraud claims in cases where a transnational fraudulent scheme includes a material American component.

As Congress has recognized in the text of the Securities Exchange Act of 1934 ("Exchange Act"), fraudulent conduct that occurs in this country may impact securities prices in worldwide markets. Accordingly, foreign investors have a strong interest in ensuring that American prohibitions on securities fraud sufficiently deter such fraudulent conduct, and provide a remedy to all investors who are injured as a result. This is particularly so because, depending on the extent and nature of the fraudulent conduct that occurs in

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

America, foreign investors may find it impractical to bring separate lawsuits in their home countries that encompass the full transnational scheme. Moreover, foreign investors often purchase the securities of businesses that have a substantial American presence, and both foreign and domestic investors alike rely on American law to ensure that corporations doing business in America are not tainted by fraud. A rule that would limit the applicability of America's securities regulation regime so as to exclude foreign investors who have been harmed by a fraudulent scheme executed within U.S. borders would shake foreign investors' confidence in American business, and make any corporation with a significant American presence appear to be a less attractive investment opportunity.

SUMMARY OF ARGUMENT

The text of Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b), broadly prohibits the use of instrumentalities of interstate and foreign commerce to engage in fraudulent conduct in connection with the purchase or sale of securities. Thus, the plain language of the statute explicitly prohibits the conduct alleged in this case. Because nothing in either the text of the Exchange Act, or the canon of construction against extraterritorial application of federal law, requires a narrowing of Section 10(b)'s plain language, all investors damaged by the alleged fraud, including those who, like Petitioners, reside outside the United States or who purchased their securities on foreign exchanges, should be permitted to proceed with their claims.

The text of the Exchange Act explicitly contemplates some extraterritorial application. The term "interstate commerce" is defined to include foreign commerce. Section 2 of the Act, delineating the need for regulation, emphasizes that at least in the context of open and well-developed markets, foreign activity can have an important impact on the prices at which securities trade in the United States. Section 10(b), unlike other sections of the Act, is not limited only to securities registered on "national" exchanges, but instead applies to all securities. And Section 30(b) of the Act explicitly exempts from the Act's reach certain foreign transactions – thus implying that transactions not so exempted (like the transactions at issue in this case) fall within the Act's ambit. Given this statutory language, Petitioners have stated an Exchange Act claim.

First, Petitioners have alleged the existence of fraudulent conduct within the meaning of Section 10(b). Much of the alleged fraud in this case was committed by the defendant-issuer's American subsidiary and occurred wholly within the United States – indeed, the Complaint does not even allege that the foreign defendants were informed of the fraud until halfway through the Class Period. Thus, with respect to the American conduct, no question of extraterritoriality is even raised, and the statute should be applied as written.

This result does not change for the related fraudulent conduct that occurred outside of the United States (i.e., in Australia), which was wholly dependent on the fraud within the United States and which was also prohibited by the plain language of Section 10(b). Although there is a general presumption that federal

statutes do not apply to extraterritorial conduct unless there is "affirmative evidence" that Congress so intended, that canon of construction does not bar the application of federal law to a transnational scheme with a material domestic component. Instead, that canon bars application of federal law to conduct that occurs *entirely* on foreign soil. Because any foreign fraudulent conduct in this case was heavily intertwined with the domestic conduct, there arises no presumption that Congress did not intend Section 10(b) to prohibit the entire scheme. This conclusion is buttressed by the text of the Exchange Act itself which, as described above, explicitly applies to foreign conduct. Although the extraterritoriality canon may be appropriately applied to the Exchange Act for a wholly foreign scheme – a question that this Court need not reach in this case – the statute's explicit references to foreign activity should, at the very least, be interpreted to encompass schemes that include material domestic elements.

Second, Petitioners have alleged that the fraud occurred in connection with the purchase or sale of a security. Because the alleged fraudulent conduct impacted the issuer's securities trading in the United States on the New York Stock Exchange ("NYSE"), no issue is raised regarding the extraterritorial application of the phrase "purchase or sale" in Section 10(b). This result does not change merely because these particular plaintiffs purchased their shares abroad. Congress recognized in the Exchange Act that such foreign trades, at least in an efficient market, impact the prices at which American securities are bought and sold. For that reason, Congress sought to prohibit those "deceptive devices" (at least those with a domestic component, as

described above) that would influence trading of an issuer's securities on foreign exchanges, in order to ensure the integrity of the price of the very same issuer's securities trading in American markets.

For over three decades, courts have allowed foreigners to assert Section 10(b) claims relating to securities they purchased on foreign exchanges where significant fraudulent conduct occurred domestically. Yet Congress has never amended the Exchange Act to limit such claims. Congress's inaction is striking given the fact that, in recent years, Congress has substantially amended the private right of action under Section 10(b) on three separate occasions. Congress's silence in the face of substantial agreement among the circuits that foreign investors may bring Section 10(b) claims when they are harmed by transnational schemes with a material domestic component strongly suggests that Congress believes such claims advance the Act's purposes.

Finally, the Act should not be construed in a manner that would undermine its goals. As numerous appellate courts have recognized, in enacting the Exchange Act, Congress could not have intended to allow the United States to become a haven for international fraudsters. Such an interpretation of the securities laws would weaken this country's reputation in the global community as a stringent regulator of fraud.

For these reasons, Petitioners' claims should be allowed to proceed.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 10(b) PERMITS PETITIONERS TO BRING THEIR CLAIMS

Section 10(b) of the Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered. . . , any manipulative or deceptive device or contrivance in contravention of [SEC rules promulgated under the Exchange Act].
> . . .

15 U.S.C. § 78j(b). "Interstate commerce," in turn, is defined to mean commerce and communication "among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. . . ." 15 U.S.C. § 78c(a)(17). Thus, by its terms, Section 10(b) forbids deceptive devices in connection with international commerce and communication. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998).

Petitioners here allege a typical fraudulent scheme. Respondent National Australia Bank Ltd. ("NAB"), an Australian corporation, conducts business throughout the world, and issues securities that trade on NYSE as

well as on foreign exchanges. JA96a-97a.[2] In 1998, NAB purchased HomeSide Lending ("HomeSide"), a American company headquartered in Florida. At HomeSide's offices in Florida, HomeSide and its officers (the "HomeSide Respondents") falsified the value of HomeSide's assets. JA82a-84a. The HomeSide Respondents then transmitted the falsified information from Florida to NAB's headquarters in Australia, where the information was incorporated into NAB's financial statements. NAB both included HomeSide's results in its consolidated totals, and separately reported HomeSide's standalone results. JA61a, SA6. These financial statements were filed, among other places, with the SEC and NYSE in the United States, and with the Australian Securities and Investment Commission. JA97a. Because NAB securities traded efficiently around the world, the falsified financial statements contributed to the artificial inflation of NAB's securities on every exchange where they were listed, including the NYSE. JA96a-97a. Petitioners, residents of Australia who purchased NAB securities on an Australian securities exchange, experienced losses when the fraud at HomeSide was revealed, causing sharp drops in the value of their holdings. JA39a-40a.

Under any ordinary reading of Section 10(b), Petitioners have stated a claim.[3] Respondents are

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[2] "JA" and "SA" refer to the Joint Appendix and the Supplemental Appendix, respectively, which were filed on January 19, 2010.

[3] *See also* Brief for the United States as Amicus Curiae in Opposition to Certiorari 12-13, *Morrison v. Nat'l Austl. Bank*, 08-1191 (Oct. 2009) ("U.S. Br.") (conceding that Respondents violated Section 10(b)).

alleged to have employed "manipulative or deceptive device[s]" with scienter, and the false financial results were reported worldwide in connection with the "purchase or sale" of NAB securities. Nor is there any dispute that, if Congress so desired, it had the power to prohibit such conduct. *See Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949). Thus, the only basis for dismissing Petitioners' claims is if the statute is read *not* in accord with its plain meaning, but instead far more narrowly to apply only to a very limited subset of conduct. Neither the statute itself, nor the extraterritoriality canon of statutory construction, permits such a reading.

A. The Exchange Act Explicitly Applies to Conduct with an Extraterritorial Component

In enacting the Exchange Act, Congress both explicitly and implicitly recognized the impact that foreign activity can have on American domestic interests, and extended the application of the Act accordingly.

First, the Act explicitly recognizes the importance of extraterritorial conduct to domestic interests. Section 2 of the Act, titled "Necessity for Regulation," explains that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto," and, consequently, the Exchange Act was enacted to protect "interstate commerce." 15 U.S.C. § 78b. As noted above, "interstate commerce" is defined to include commerce "between any foreign country and

any State." 15 U.S.C. § 78c(a)(17). Congress stated that such securities trading is "carried on in large volume by the public generally and in large part originate[s] outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce. . . ." 15 U.S.C. § 78b(1). Because "State" is defined to mean "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States," 15 U.S.C. § 78c(a)(16), transactions that originate on exchanges located outside the "States" include those that originate on exchanges in foreign countries.

Nor are these references to foreign countries mere "boilerplate language." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) ("*ARAMCO*"). Congress recognized that because well-developed markets absorb information on a global scale, transactions even in foreign countries can affect American interests. Section 2 provides that trading in such markets establishes prices "disseminated and quoted throughout the United States *and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold . . ." 15 U.S.C. § 78b(2) (emphasis added). Congress found that regulation was necessary because "the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities . . ." *Id.* § 78b(3). Indeed, the legislative history confirms that Congress intended the Exchange Act to "provide for the regulation of securities exchanges and over-the-

counter markets operating in interstate and *foreign commerce* and through the mails, to prevent inequitable and unfair practices on such exchanges and markets. . . ." H.R. Rep. No. 78-1838, (Conf. Rep.), 1934 WL 1291 (May 31, 1934) (emphasis added). As this Court held in *Pasquantino v. United States*, 544 U.S. 349 (2005), "[T]he wire fraud statute punishes fraud executed in interstate or foreign commerce . . . , so this is surely not a statute in which Congress had only domestic concerns in mind." *Id.* at 371 (citations and internal quotation marks omitted). The same reasoning applies here.

Moreover, as explained above, Section 10(b) broadly prohibits any person from using any instrumentality of "interstate commerce" (defined to include foreign commerce) to employ a "deceptive device" in connection both with securities registered on national exchanges, and "any security not so registered." 15 U.S.C. § 78j(b). As Judge Friendly concluded after examining the legislative history of Section 10(b) in *Leasco Data Processing Equipment Corp.*, 468 F.2d 1326 (2d Cir. 1972), "Since Congress . . . meant § 10(b) to protect against fraud in the sale or purchase of securities *whether or not these were traded on organized United States markets*, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers." *Id.* at 1336 (emphasis added).

Notably, Congress could have, but chose not to, apply territorial limitations to Section 10(b). For example, Section 9 of the Exchange Act limits prohibited transactions to those involving securities registered on a "national securities exchange," 15 U.S.C. § 78i(a)(1).

Similarly, Section 5, titled "Transaction on Unregistered Exchanges," is limited to "an exchange within or subject to the jurisdiction of the United States. . . ." 15 U.S.C. § 78e. That Congress affirmatively expanded Section 10(b) suggests Congress intended a broader application. *Cf. Patterson v. Shumate*, 504 U.S. 753, 758 (1992) ("The [Bankruptcy] Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency. . . . Congress' decision to use [a broader phrasing] strongly suggests that it did not intend to restrict the provision. . . .").[4]

Additionally, the scope of conduct prohibited by Section 10(b) is defined by reference to the SEC's own interpretive rules and regulations. *See* 15 U.S.C. § 78j(b). Notably, "[a]lthough it has the power to grant exemptions from rules under Section 10(b), see Rules 10b-6(d), 10b-7(n) . . . the Commission has not promulgated a rule exempting foreign transactions from Rule 10b-5." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968); *see also* Offshore Offers and Sales, Exchange Act Release No. 6863, 1990 WL 311658, at *5 (Apr. 24, 1990) (exempting certain offshore transactions

[4] Section 10(b) also applies to "*any* security," with "very broad[ ]" definitions of what constitutes a "security." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 n.6 (1971). If Congress intended that the Exchange Act generally, or the anti-fraud provision in Section 10(b) specifically, not be applied extraterritorially, it could have excepted securities issued by a foreign issuer or traded on foreign exchanges from these provisions. That Congress did not do so weighs in favor of the Act's extraterritorial application. *See Patterson*, 504 U.S. at 758.

from registration requirements, but explicitly stating that the regulation "does not limit the scope or extraterritorial application" of Section 10(b)). The SEC's interpretation of the scope of conduct regulated by statutes it administers is entitled to considerable weight. *See United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 718-19 (1975).

The text of Section 30 of the Exchange Act further demonstrates that Congress intended that the Act should apply to transactions with a foreign component. That section gives the SEC authority to regulate brokers and dealers who use interstate commerce to effect transactions in American securities on foreign exchanges. *See Schoenbaum*, 405 F.2d at 207. Section 30(b), however, contains a limited exemption from regulation for "any person insofar as he transacts a business in securities without the jurisdiction of the United States. . . ." unless the person is doing so in order to evade the other requirements of the Act. 15 U.S.C. § 78dd(b). Courts agree that this is a limited exception confined to persons who are in the business of trading securities, and does not apply to isolated transactions. *See Schoenbaum*, 405 F.2d at 208; *Robinson v. TCI/US West Commc'ns.*, 117 F.3d 900, 905 (5th Cir. 1997). "[S]ince Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit the exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted." *Schoenbaum*, 405 F.2d at 208.

The Exchange Act's venue provision also implicitly recognizes that actionable fraud may involve some

foreign conduct and foreign actors. Section 15 U.S.C. § 78aa permits a lawsuit to be brought in the district where the violation occurred, *or* "in the district wherein the defendant is found or is an inhabitant or transacts business." *Id.* This provision stands in sharp contrast to the far more limited venue provisions of Title VII and the Federal Tort Claims Act, which this Court found contributed to an inference that Congress had not intended an extraterritorial application for those statutes. *See ARAMCO*, 499 U.S. at 256 (Title VII's venue provisions "are ill-suited for extraterritorial application as they provide for venue only in a judicial district in the State where certain matters related to the employer occurred or were located"); *Smith v. United States*, 507 U.S. 197, 202 (1993) (FTCA's venue provision permits claims "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," which creates an anomalous result if applied to Antarctica).

Thus, the Exchange Act's text is replete with "affirmative evidence" of Congress's intention that it apply to extraterritorial conduct. *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 176 (1993).

B. The Extraterritoriality Canon Does Not Bar Petitioners' Claims

Given that the plain language of Section 10(b) prohibits the conduct alleged in this case, and given that Congress has explicitly recognized the importance of even foreign purchases in efficient markets to American interests, the only basis for dismissing Petitioners' claims would be if this Court were to apply to Section 10(b) the

canon of construction that presumes that federal statutes are not meant to apply extraterritorially. *See Foley Bros.*, 336 U.S. at 285. However, that presumption applies when the conduct at issue occurred on foreign soil. Here, because the fraud had a significant – indeed, overwhelming – domestic component, and the statute makes it clear that some extraterritorial conduct falls within its ambit, there is no basis for a presumption that Congress did not intend to regulate the entire scheme.

1. Section 10(b)'s Prohibition on Deceptive Conduct Extends to the Fraud Alleged

It is axiomatic that application of a statute to domestic conduct does not raise concerns about extraterritoriality. *See, e.g.*, *Pasquantino*, 544 U.S. at 371 ("Petitioners used U. S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States."); *Small v. United States*, 544 U.S. 385, 389 (2005) (in the context of gun possession law, an "extraterritorial" application is one that would "prohibit[ ] unlawful gun possession abroad as well as domestically"); *id.* at 400 (Scalia, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U.S. borders*," and having no role to play in a case involving "conduct *within U. S. borders*"); *cf. Rasul v. Bush*, 542 U.S. 466, 480 (2004) ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States.").

Here, the Complaint alleges that false financial statements were drafted by the HomeSide Respondents, and sent to NAB to be publicly reported. Thus, the HomeSide Respondents employed a "manipulative or deceptive device or contrivance" within the meaning of Section 10(b), and application of Section 10(b) to this conduct is not "extraterritorial."

That these Respondents' direct communications with the market were minimal is of no moment. In *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), this Court examined Exchange Act claims brought against certain vendors of cable set-top boxes who had allegedly conspired with Charter Communications to help Charter inflate its reported revenues. *Id.* at 153-55. Even though the vendors had not spoken directly to the market, this Court concluded they had engaged in a deceptive "course of conduct" that "included both oral and written statements" by making sham purchases from Charter and falsifying associated paperwork. *Id.* at 158.[5] This is precisely what Petitioners allege the HomeSide Respondents did.

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[5] This Court ultimately concluded in *Stoneridge* that despite the vendors' deceptive acts, the private plaintiffs had not established that they "relied" on the vendors' actions and thus could not establish the elements of a private claim. 552 U.S. at 160-62. However, because reliance is not an element of a government enforcement action, *SEC v. Pirate Investor LLC*, 580 F.3d 233, 239 n.10 (4th Cir. 2009), even absent that element, the vendors' deceptive conduct in *Stoneridge* constituted a complete violation of Section 10(b). Moreover, as discussed below, Petitioners here have alleged sufficient facts to satisfy the element of reliance with respect to HomeSide's conduct.

In concluding that NAB, and not HomeSide, was primarily responsible for the fraudulent conduct, the Second Circuit did not discuss this Court's analysis in *Stoneridge*. *See Morrison v. Nat'l Austl. Bank, Ltd.*, 547 F.3d 167, 176 (2d Cir. 2008). Instead, the Second Circuit conducted a comparative analysis, concluding that because, by its reckoning, NAB was more responsible for the fraud than HomeSide, the entire scheme was immune under Section 10(b). *See id.* Not only is this conclusion at odds with the facts alleged, but the Second Circuit's analysis made no attempt to engage the text of the statute. Nothing in Section 10(b) requires or permits a comparative analysis of each defendant's contribution to an alleged fraudulent scheme: the statute broadly prohibits "any manipulative or deceptive device."[6] Indeed, Congress explicitly provided in the PSLRA that such comparative analyses are only relevant to the *damages* phase of litigation, and even then, only when the conduct was reckless rather than the intentional fraud alleged against the HomeSide Respondents. *See* 15 U.S.C. §78u-4(f).

In fact, unlike the third-party vendors in *Stoneridge*, the HomeSide Respondents are alleged to have

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[6] As the Eleventh Circuit subsequently observed, the Second Circuit's new "comparative" analysis also appears to have been at odds with its prior precedent. *See In re CP Ships Ltd. Sec. Litig*, 578 F.3d 1306, 1317 n.11 (11th Cir. 2009) ("[T]he recent *Morrison* case in the Second Circuit may represent a somewhat more stringent application of the conduct test than was indicated in previous Second Circuit cases"); *see also* U.S. Br. 20 ("the decision below appears to impose a standard more demanding than the approaches previously adopted by the Second Circuit and other courts of appeals").

masterminded the entire scheme. Indeed, the Complaint does not even allege that NAB was informed of the fraud until halfway through the Class Period, JA89a. Though Petitioners' allegations (which must be accepted as true for pleading purposes) state that NAB was at least reckless in failing to discover the fraud earlier, there remains the possibility that a trier of fact might conclude that for a large portion of the Class Period, the *only* fraudulent conduct in this case was committed by the American subsidiary and its officers. *Compare Chill v. General Electric Co.*, 101 F.3d 263, 270 (2d Cir. 1996) (dismissing claims against GE because there was no evidence that it knew of the fraud at its subsidiary, Kidder Peabody) *with In re Kidder Peabody Securities Litigation*, 10 F. Supp. 2d 398, 408 (S.D.N.Y. 1998) (sustaining claims against the subsidiary for supplying the false statements to its parent). Thus, application of Section 10(b)'s prohibition on "manipulative or deceptive" conduct to the HomeSide Respondents presents no issue of extraterritoriality.[7]

Nor does the presumption against extraterritorial application bar Petitioners' claims with respect to that portion of the scheme that concerned NAB's activities in Australia. That is because the presumption bars application of a federal statute when the relevant

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[7] The HomeSide Respondents cannot be deemed mere "aiders and abetters" of the fraud. This is because the charge of "aiding and abetting" includes as one element the existence of a separate primary violator for the defendant to have aided. *See SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996). If a factfinder were to conclude that NAB did not act with scienter for the first half of the period, there would be no other defendant for the HomeSide Respondents to have "aided."

conduct occurs *entirely* outside the United States – not when the conduct contains a material domestic component.

For example, in *ARAMCO*, this Court was called upon to consider whether Title VII of the Civil Rights Act applies to employment conditions occurring entirely in Saudi Arabia. 499 U.S. at 247. Because the language of the statute did not provide "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty," *id.* at 248 (quoting *Foley Bros.*, 336 U.S. at 285), and reading it so broadly created inconsistencies in the statutory scheme, *id.* at 255-56, this Court held that Title VII does not apply to *entirely* overseas conduct.

Similarly, in *Sale v Haitian Centers*, this Court considered the application of certain provisions of the Immigration and Naturalization Act to conduct that occurred solely outside U.S. territorial waters. *See* 509 U.S. at 171. Once again, the Court found that after considering the statutory scheme as a whole, application outside U.S. territory created anomalies that Congress could not reasonably have intended, *see id.* at 172-74, and that the presumption against extraterritorial application of American law lent further support to a narrower reading, *see id.* at 173; *see also Foley Bros.*, 336 U.S. at 285 (concerning labor conditions in Iran and Iraq); *Smith*, 507 U.S. at 199 (tort claim arising "exclusively on acts or omissions occurring in Antarctica"); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 586 (1992) (Stevens, J., concurring in the judgment) (concerning the applicability of a provision of the Endangered Species Act to actions taken outside the

U.S.). But, when a single course of conduct depends heavily on conduct *within* the United States, there is simply no basis to assume that Congress did not intend to regulate the entire scheme. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (applying American law to a transnational scheme); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-276 (1927) (same). This is particularly so where, as here, the fraudulent conduct overseas was entirely derivative of, and dependent on, the domestic conduct.

This Court's decisions in *F. Hoffman-La Roche Ltd. v. Empagran*, S.A., 542 U.S. 155 (2004) and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) are not to the contrary. In those cases, the statutes at issue specifically delineated when a scheme that included both foreign and domestic conduct would be characterized as foreign and outside the reach of American law. Thus, in *Hoffman*, this Court considered the scope of the Foreign Trade Antitrust Improvements Act, which excludes from the reach of the Sherman Act certain domestic "conduct involving trade or commerce . . . with foreign nations," with very precise definitions as to what constitutes such conduct. 542 U.S. at 161 (quoting 15 U.S.C. § 6a). Similarly, in *Microsoft*, this Court considered the Patent Act, which by its terms extends only to conduct within the territorial United States, and then contains a very limited extension to precisely-defined activity, involving both foreign and domestic elements, undertaken with the intent to evade the Patent Act's domestic requirements. *See* 550 U.S. at 443-45. In both cases, this Court was called upon to interpret these carve-outs and determine when, under those statutes, transnational conduct would fall within the scope of the law. *See Microsoft*, 550 U.S. at 442; *Hoffman*, 542 U.S. at 162.

Section 10(b), by contrast, contains no provision characterizing transnational schemes as foreign. Therefore, where the domestic component is material to the completion of the fraud – here, so material that a factfinder may conclude that there was *no* fraudulent foreign conduct for the first half of the Class Period – there is no basis to apply a presumption against extraterritoriality, and the plain language of Section 10(b) should control. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (liability under Section 10(b) exists if the domestic conduct was material to the fraud); Brief of Amicus Securities & Exchange Commission, *Morrison v. Nat'l Austl. Bank*, 07-0583 (2d Cir.), at 22 (recommending that Section 10(b) be applied to frauds where "the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme").

A rule that would designate as "extraterritorial" any scheme that included an element of foreign conduct would be impossible to administer and would greatly damage America's interests. Even in 1934, Congress recognized that for an actively-traded security in a well-developed market, prices quoted in foreign countries would affect prices in the United States, 15 U.S.C. § 78b(2); 76 years later, improvements in technology and the integration of international markets have only strengthened this association. Certainly, if every country refused to apply its fraud laws to transnational conduct, fraudsters would have unprecedented freedom to effectuate their schemes without fear of penalty. Nor does it make sense for a fraud to be subdivided into pieces and tried in different locations or under different laws; the entire scheme must be considered as a whole.

See Hannah L. Buxbaum, *Multinat'l Class Actions Under Fed. Sec. Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 58-59 (2007) (recognizing the interest that all nations have in trying claims arising out of a single transnational scheme in a single forum). Here, given the very real possibility that the foreign parent was not even aware of the American misconduct from 1999 through 2000, it hardly makes sense to characterize the fraud as "extraterritorial" and refuse to apply the plain terms of Section 10(b).

The *Restatement (Third) of Foreign Relations Law of the United States* (1987), which this Court relied upon in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), also supports the application of American law to a fraud that contains a material domestic component. Section 416 applies specifically to securities actions, and provides that federal securities laws apply to "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." Even more broadly, § 403 makes it clear that regulation is reasonable when there is a "link" to the regulating state, based on, among other things, conduct within the territory. *Id.* § 403(2)(a). Regulation is also reasonable when there is universal agreement among states that the activity should be regulated, when regulation is important to the international "economic system," and when there is little likelihood of international conflict. *Id.* § 403(2) (c, e, h). A single, transnational fraudulent scheme where substantial portions occur within the U.S. has an important "link" to the U.S. as a regulating territory; moreover, nations universally agree on the desirability of regulation and, unlike the antitrust laws,

application of Section 10(b) to activity outside American borders has not resulted in conflict with other nations. *See Restatement* § 416, Note 3 ("In contrast to regulation under the antitrust laws, which not infrequently involved prohibition of conduct which another state favored or required, . . . United States securities regulation . . . has not resulted in state-to-state conflict."); *cf. id.* at cmt a (reasonableness of applying securities laws "depends not only on the territorial links of a given activity with the United States, but also on the character of the activity to be regulated. . . . Thus, an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.").

Finally, any presumption against the application of Section 10(b) to NAB's conduct is rebutted by the fact that the statute explicitly applies extraterritorially, "so this is surely not a statute in which Congress had only domestic concerns in mind." *Pasquantino*, 544 U.S. at 372. At minimum, these statutory provisions are "affirmative evidence" that Section 10(b)'s prohibitions on fraudulent conduct extend at least to foreign actions taken in furtherance of a transnational fraudulent scheme with a material domestic component. *Sale*, 509 U.S. at 176.

2. The Alleged Fraud Occurred In Connection with the Purchase or Sale of Securities Under Section 10(b)

NAB's securities were listed on the NYSE and traded within the United States. NAB was also required under SEC regulations to file its financial statements

in this country. Finally, because NAB securities traded in a globally efficient market, NAB's American securities were priced in accordance with pricing for common shares elsewhere, including on Australian securities exchanges. Thus, the false statements alleged here were issued in connection with *domestic* purchases and sales of securities, and the issue of extraterritorial application of Section 10(b) does not arise.

That the particular plaintiffs in this case made their purchases outside the U.S. does not change this result where, as here, the market for the securities is globally efficient. Congress recognized in Section 2 that securities prices are set by information and trading that transcends national boundaries. 15 U.S.C. § 78b(2). Thus, Congress made it clear that there is an inherent American interest in ensuring that even foreign purchasers are not defrauded, because the prices they pay for their securities will ultimately impact the prices at which securities are sold in America. Once again, Section 2 is affirmative evidence of Congress's intention that Section 10(b)'s prohibition on fraudulent conduct "in connection with the purchase or sale of any security" extends at least to fraudulent conduct (with, as described above, a material domestic component) taken in connection with foreign purchases and sales "upon securities exchanges and over-the-counter markets," 15 U.S.C. § 78b.

To be sure, in *Hoffman*, this Court held that, under the FTAIA, where the anticompetitive conduct is both foreign and domestic, and where the foreign plaintiffs complain of injuries that are "independent" of the domestic effects, the foreign plaintiffs have no cause of

action. *See Hoffman*, 542 U.S. at 164. However, that holding was based on the specific terms of the FTAIA, in which Congress explicitly exempted from the scope of the Sherman Act certain domestic anticompetitive conduct. *See id.* at 166. That exempted conduct was statutorily defined to include anticompetitive conduct involving foreign commerce that had no adverse domestic effect. *See id.* Under such circumstances, this Court held that the foreign plaintiffs could not use the existence of some domestic effects that had no relationship to their own injuries as a basis for a private claim, because without the requisite connection to domestic effects, those particular plaintiffs' injuries were "not the consequence of any domestic anticompetitive conduct that Congress sought to forbid." *Id.* at 165-66.

Section 10(b), however, unlike the FTAIA, does *not* contain a statutory immunity for fraudulent conduct without domestic effects. Moreover, this Court's distinction between domestic effects and foreign ones in *Hoffman* was well in keeping with antitrust law generally, where the particular market and its precise definition – including its geographic scope – plays an important role in determining the impact of anticompetitive conduct. *See, e.g., Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993). In the antitrust realm, because there is little reason to believe a single market for a particular good – particularly a consumer good such as the vitamins at issue in *Hoffman* – will span several countries, it is reasonable to sever domestic effects from foreign ones.

In the context of securities that trade in globally efficient markets, however, there can be no foreign

effects that are "independent" of domestic ones, as Congress recognized. 15 U.S.C. § 78b(2). Therefore, it makes little sense to apply a rule that artificially seeks to sever purchases abroad from purchases within the territorial United States.

3. Respondents' Fraud Caused Petitioners' Injuries

Finally, Petitioners have alleged facts that satisfy the elements of reliance and loss causation under Section 10(b).

In a fraud on the market case, the element of reliance is satisfied when an investor buys or sells a security at a price that has been distorted by fraud. *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Therefore, in a globally efficient market, "reliance" does not exist in any single country, but is instead a result of information that is generally available worldwide, including information on trading patterns. *See* 15 U.S.C. § 78b(2); Buxbaum, *supra*, at 46. Thus, the fact that NAB filed separate, but materially identical, financial statements in Australia and the United States is of no moment, because Petitioners relied on all available information, not merely information filed in a particular territory. Moreover, the globally efficient market was interdependent across countries – NAB could not have filed two sets of irreconcilable numbers, and if it had done so, the fraud would have immediately been revealed. Australian investors "relied" upon the American filings in the sense that the American filings confirmed the financial information contained in the Australian ones.

Nor can it be said that the chain of causation between the fraud and the Petitioners' ultimate losses was too remote for liability, as the Second Circuit believed. *See Morrison*, 547 F.3d at 176-77. That court first held that only the domestic conduct could be considered in determining whether Petitioners' losses resulted from the fraud, and then concluded that the domestic component was too distant from the financial statements issued by NAB to fall within the ambit of Section 10(b). *See id.* Both of these conclusions were in error.[8]

First, as explained above, the entire fraudulent scheme to falsify NAB's financial statements was prohibited by the plain language of Section 10(b), and because of the scheme's substantial domestic component, no presumption arises that the statute should not be applied exactly as written. For the reasons stated above, once it is determined that the domestic conduct was integral to the scheme, it is meaningless to parse the fraud into its constituent parts and such an effort only invites piecemeal litigation or, worse, immunity for fraudsters who design their frauds to escape the jurisdiction of any one nation. Therefore, the only relevant question is whether Petitioners' injuries were caused by NAB's false financial statements, a point upon which there is no dispute.

[8] Though the Second Circuit discussed the relationship between the fraud and Petitioners' injuries in terms of "losses," it did not mean the element of loss causation – which was satisfied when the fraud was revealed to the market and caused the drop in NAB's securities prices – but the elements of reliance and transaction causation. *See Morrison*, 547 F.3d at 176-77; *Basic*, 485 U.S. at 243 (the element of reliance "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury").

Second, even if this Court were inclined to subdivide the scheme into domestic and foreign components, in this case, Petitioners have alleged facts that, if proven, would demonstrate that their injuries were directly traceable to the domestic portion of the conduct – namely, HomeSide's generation of false financial statements and transmittal of those false statements to NAB.

As Petitioners demonstrate, the false statements at NAB were proximately caused by the fraudulent conduct at HomeSide. Br. for Petr. 30-31. There is every reason to believe that the 1934 Congress (and the 1995 Congress that enacted the PSLRA) would have at least expected traditional common law causation concepts to be employed when interpreting the statute; if anything, the securities laws were enacted because common-law concepts were too restrictive. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-389 (1983). For that reason alone, Petitioners have stated a claim.

Additionally, just two terms ago, this Court examined reliance and causation in a situation where – as here – the entity that ultimately issued the false statements to the public was alleged to have schemed with a different entity that contributed to the fraud. *See Stoneridge*, 552 U.S. at 158-59. This Court explained that in order to determine whether a particular defendant's deceptive conduct had a sufficient "proximate relation" to the plaintiff's injuries to satisfy the element of reliance, a court must first determine whether the "deceptive acts" were "communicated to the public." *Id.* at 158-59. If this has not occurred, the court examines the "chain" between the acts and the ultimate false statement,

id. at 159, considering such factors as whether the defendant had a role in preparing the false financial statements, whether the defendant's actions made it "necessary or inevitable" that a false statement would issue, and whether the defendant's conduct occurred in the "investment sphere" or in the "the marketplace for goods and services." *Id.* at 166.

There is no reason why a new and more restrictive test for causation – one that goes beyond both proximate cause and *Stoneridge* – should apply.[9] This is particularly so because in developing the *Stoneridge* test, this Court already considered the policies of the securities laws and the scope of conduct regulated by Section 10(b). *Id.* at 160-63. Nothing in the statutory language suggests that Congress would have intended a *third* causation test depending on where the losses were experienced or the securities purchased, nor is there any basis in this Court's precedents for creating a new and distinct concept of causation for foreign harms experienced as a result of illegal domestic conduct. Certainly, HomeSide should not enjoy a functional exemption from the securities laws as compared to its domestic mortgage service competitors. *Cf. Hellenic Lines Ltd. v. Rhoditis*,

[9] *Stoneridge* has been employed as the test for causation when determining whether any particular actor has "caused" statements to issue – be it an outside vendor, a law firm, an investment bank, an officer of the company, or a subsidiary. *See, e.g., In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 203 (E.D. Pa. 2008); *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008); *In re Nature's Sunshine Prods. Sec. Litig.*, No. 2:06cv267 (TS), 2008 WL 4442150 (D. Utah Sept. 23, 2008); *In re Parmalat Sec. Litig.*, 570 F. Supp. 2d 521 (S.D.N.Y. 2008).

398 U.S. 306, 310 (1970) (applying Jones Act to business owned and operated in U.S. despite alien ownership, in part to avoid giving an American-based business a special immunity from liability that its domestic competitors lacked); *Morrison*, 547 F.3d at 175 ("those who operate from American soil should not be given greater protection from American securities laws because they carry a foreign passport or victimize foreign shareholders").

Under *Stoneridge*, Petitioners' injuries were caused by the domestic conduct. Section 10(b) prohibits the use of deceptive devices "directly or indirectly"; it does not require that the specific actor personally make the false statements. And here, unlike in *Stoneridge*, HomeSide's fraudulent conduct was explicitly "communicated to the public," 552 U.S. at 159: not only were HomeSide's results incorporated into NAB's totals, but HomeSide's own financial results were separately reported and attributed to HomeSide. (SA6, 21, 26, 60). And because the results specific to HomeSide were announced to the market as they had been supplied to NAB by the HomeSide Respondents, the HomeSide Respondents played an important role in preparing NAB's financial statements. Finally, because HomeSide prepared its financials and communicated them to NAB for the purpose and with the intention that they be included in NAB's securities filings, the HomeSide Respondents' conduct occurred in the "investment sphere," and not "the marketplace for goods and services." For these reasons, the HomeSide Respondents caused NAB's false statements to issue, and Petitioners relied on their actions.

Moreover, in *Stoneridge*, this Court held that reliance and causation would be satisfied if the defendant's actions made it "necessary or inevitable" that the false statement would issue. *Id.* at 161. Here, HomeSide was a subsidiary of NAB; its results, as reported, necessarily would be included in NAB's financial statements, at least barring some kind of extraordinary affirmative action by NAB. HomeSide, not NAB, made the decision as to how it would value its mortgage assets. JA82a. This is a far cry from the situation in *Stoneridge*, where the issuing company, rather than the defendant vendors, made the determination as to how to account for the relevant transactions. *See Stoneridge*, 552 U.S. at 161. Additionally, NAB was not even told of the fraud at HomeSide for the first half of the Class Period, JA89a; at least during that time, although Petitioners' allegations of recklessness must be accepted at the pleading stage, there remains the possibility that a factfinder would conclude that NAB did not even know of the fraud, once again rendering it "necessary or inevitable" that HomeSide's fraud would cause NAB to issue false statements. Thus, the HomeSide Respondents' conduct – and thus, the domestic conduct – was relied upon by Petitioners.

Any other application of the *Stoneridge* test would hand corporations a license to commit fraud. It is quite common for frauds to occur at subsidiaries which then transmit false financial information to the parent. *See, e.g.*, *Kidder*, 10 F. Supp. 2d at 408; *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333 (S.D.N.Y. 2005); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433 (S.D.N.Y. 2005); *In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388 (S.D.N.Y. 2005); *Menkes v. Stolt-*

Nielsen S.A., No. 3:03cv409 (DJS), 2006 WL 1699603 (D. Conn. June 19, 2006); *Teachers' Ret. Sys. of La. v. ACLN, Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957 (S.D.N.Y. Dec. 27, 2004). In many cases, there may not be strong evidence that the parent corporation was even aware of the fraud. *See Chill*, 101 F.3d at 270. It would wreak havoc if such subsidiaries were not deemed to have "caused" the fraud, and thus no claim would lie against either parent or subsidiary. Parent corporations would routinely adopt policies of "see no evil, hear no evil" in order to shunt responsibility for the fraud onto the subsidiary, leaving injured investors with no remedy at all. Congress cannot have intended that Section 10(b) – or the private right of action that it ratified with the PSLRA, *see Stoneridge*, 552 U.S. at 165 – would be so easily circumvented. *Cf. Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir. 1995) (rejecting an interpretation of Section 10(b) that would allow easy circumvention "simply by preparing SEC filings outside the United States").

II. CONGRESS HAS MANIFESTED ITS INTENTION THAT THE SECURITIES LAWS PROTECT FOREIGN INVESTORS INJURED BY DOMESTIC FRAUD

If there is any remaining doubt that Congress intended the private right of action under Section 10(b) to extend to the conduct alleged here, it is resolved by observing that Congress has in recent years made extensive changes to the laws governing private securities actions, and yet has not moved to disturb the uniform opinion of the circuits that Section 10(b) does, under the proper circumstances, permit a private right

of action for foreign purchasers injured by domestic conduct.

Beginning with *Schoenbaum v. Firstbrook* in 1968, the Second Circuit Court of Appeals has issued a series of decisions developing an analysis for determining the transnational reach of the federal securities laws.[10] The analysis – articulated in terms of "conduct" and "effects," *see Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983) – has influenced other circuit courts of appeals analyzing the extraterritorial reach of the federal securities laws. Based on principles developed by the Second Circuit, courts have agreed that "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners. . . ." *In re CP Ships Ltd. Sec. Litig*, 578 F.3d 1306, 1313 (11th Cir. 2009) (citing *Bersch*, 519 F.2d at 987). Though the circuits have differed in their precise articulation as to the contours of the conduct and effects test, no circuit has disagreed with the basic framework. *See Kauthar SDN BHD*, 149 F.3d at 665-67 (comparing circuit approaches); *Robinson*, 117 F.3d at 905-07 (same). Indeed, in 1987 the *Restatement (Third) of Foreign Relations* incorporated this line of caselaw into a special provision addressing securities claims. *See Restatement* § 416.

Against this backdrop, Congress has reexamined and amended the provisions of the Exchange Act that

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[10] Courts have placed heavy reliance on Judge Friendly's analysis on the transnational application of the federal securities laws in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), and *Leasco*. *See Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413-14 (8th Cir. 1979) (gathering cases).

bear on Section 10(b)'s private right of action several times. In 1995, Congress passed the PSRLA; three years later, it enacted the Securities Litigation Uniform Standards Act of 1998; and most recently, in 2002, Congress passed the Sarbanes-Oxley Act. All of these statutes focused specifically on the private right of action under Section 10(b), addressing such matters as pleading standards, loss causation, statutes of limitation, and the ability to prosecute federal securities class action claims in state courts. *See* 15 U.S.C. § 78u-4; 15 U.S.C. § 78bb(f); 28 U.S.C. § 1658(b). Despite the extensive body of caselaw regarding the extraterritorial application of Section 10(b), Congress did not restrict such extraterritorial application. This is persuasive evidence that Congress approved of not only the implied right of action under Section 10(b), *see Stoneridge*, 552 U.S. at 165, but also its extraterritorial extension to include foreign investors who have purchased securities affected by U.S. fraud in foreign markets. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We . . . presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

III. THE UNITED STATES HAS AN INTEREST IN PREVENTING FRAUDS FROM BEING LAUNCHED FROM ITS SHORES

Finally, clear policy considerations embodied within the text of the Exchange Act support continued extraterritorial extension of the implied right of action. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 294 (1993) (the court must "infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act.").

First, preventing the use of the United States as a factory for fraudulent activity directly impacts the interests of American, as well as foreign, markets and investors. As noted by Judge Friendly, "This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975). As the Third Circuit observed in *Kasser*, if the antifraud laws do not apply, it "may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations." 548 F.2d at 116; *see also id.* ("We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"). One commenter put it in these terms:

> For issuers that maintain a dual listing, it is possible, given the internationalization of the capital markets, to engage in manipulation in one country in order to reap benefits in another. . . . If U.S. law extends only to claims arising out of U.S. transactions, such fraud would be insufficiently deterred if the impact of the fraud in other markets outstripped whatever damages were paid to U.S. investors.

Buxbaum, *supra*, at 57-58.

Moreover, this country has an interest in maintaining a reputation as a trustworthy place to do business and a reliable location for foreign investment. If foreign investors believe that they cannot trust the

securities issued by corporations with a substantial American presence – because the American portion of the business may not be subject to stringent antifraud regulation – those investors will hesitate to risk their capital on such securities. Such a result would disadvantage American businesses relative to their competitors. Indeed, to exempt such conduct "might induce reciprocal responses on the part of other nations" causing some countries to decline acting "against individuals and corporations seeking to transport securities frauds to the United States. . . ." *Kasser*, 548 F.2d at 116.

Thus, it is clear that Congress's purposes in enacting the Exchange Act will be defeated if foreign investors are excluded from the ambit of the implied right of action even though a U.S.-based fraud has affected securities prices on both domestic and foreign exchanges and injured foreign investors.

CONCLUSION

For the reasons stated above, Petitioners have stated a claim under Section 10(b), and the Second Circuit's decision should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE AUSTRALIAN SHAREHOLDERS' ASSOCIATION AND THE AUSTRALIAN COUNCIL OF SUPER INVESTORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Australian Shareholders Association

The Australian Shareholders' Association (ASA) is a not-for-profit organization founded in 1960 to protect and advance the interests of shareholders and investors in Australia. Currently, the ASA has close to 8,000 members within Australia, and is funded primarily through membership fees.

The ASA regularly consults and serves as liaison with members of government, industry groups, and individual companies, and every year monitors approximately 200 publicly-listed Australian companies with a view to reporting on their financial performance, corporate governance, and other issues of concern to shareholders. Generally speaking, the list of companies monitored by the ASA is comprised of most of the largest 200 companies listed on the Australian Stock Exchange (known as the *ASX 200*) that are considered to be of general interest to investors, as well as a group of other companies that have been identified as being of particular interest to investors (for example, those that demonstrate poor corporate governance or have a high level of retail share ownership). For each company on the ASA Company Monitoring List, an ASA Company

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

Monitor produces a yearly report for members based on the ASA's review of company annual reports, attendance at annual general meetings, discussions and interactions with company management. The ASA Company Monitor can also attend annual general meetings of the company and vote as a proxy for ASA members who are not in attendance. In 2009, over $3.5 billion worth of proxies were allocated to the ASA, and the ASA was represented at 185 annual general meetings.

In addition, the ASA performs educational work, running workshops designed to increase members' financial literacy and awareness. Regular members' meetings are also held around Australia to allow members to engage with like-minded investors and hear experienced speakers discuss issues of importance to investors.

The ASA has also produced (and regularly updates) a series of Policy Statements reflecting shareholder views on a range of issues surrounding corporate governance, practice and disclosure. The Policy Statements were produced following an extensive consultation process, and are designed to allow companies to better understand shareholders' opinions and expectations, to ensure they fulfill their obligations.

The work of the ASA is primarily supported by volunteers; the Association employs only five members of staff, and has a team of over 100 volunteers who work to coordinate meetings and events, and to continue the Association's company monitoring program.

As the purpose of the ASA is to further and protect the interests of shareholders, the ASA devotes much of its time and resources towards monitoring companies and ensuring that shareholders are being made aware of the crucial aspects of their performance. The ASA aims to ensure that shareholders are protected against fraud and other unlawful conduct by the entities its members invest in. Whenever such conduct occurs and harms investors, the ASA aims to assist its members to be aware of their rights, and to be able to seek redress where appropriate.

The Australian Council of Super Investors

The Australian Council of Super Investors (ASCI) is a not for profit organization that represents the interests of 41 superannuation funds that collectively manage more than AUD$250 billion (US$228 billion) in funds. Approximately 10 - 20% of the funds are invested in international equities of which the majority is in the United States. The membership base is comprised of 39 Australian superannuation funds and two International Associate member pension funds.

ACSI was created by 13 Australian public sector and industry superannuation funds in March 2001 to provide advice relating to individual members' investments and develop a policy of best practice by which all funds could operate. ACSI provides advice to member funds including information concerning the impact of corporate governance, as well as environmental and social issues relating to the long term performance of the companies.

Active involvement by member funds in their investments was encouraged, and in 2002 a proxy voting advice service was provided on controversial issues. This service was expanded to include a full proxy voting advice service for the top 100 Australian Stock Exchange (ASX) companies, which was further extended to the top 200 ASX companies. In 2009, ACSI created a proxy voting advice service for the top 500 listed securities across the United States, United Kingdom and European financial markets in response to a greater proportion of ACSI managed funds investing overseas.

Since its inception, ACSI has had an active role as a liaison with international governments, regulators, fund managers and investees to protect the superannuation of its member funds invested in overseas markets. ASCI representatives have served on the Board of Governors of the International Corporate Governance Network (ICGN), and ASCI is an associate member of the Council of Institutional Investors in the United States and is a signatory to the United Nations Principles of Responsible Investment. ACSI received an award for excellence on corporate governance from ICGN in 2006 for its work in organizing member funds to assist in the prosecution of the plaintiff's case in *Unisuper v. News Corp.* (Del. Ch. 2005).

SUMMARY OF ARGUMENT

Where a person or group in the United States perpetrates a securities fraud (whether partly or wholly committed in the United States) which causes loss to investors in foreign countries, it is essential that the United States legal system and regulatory regimes permit the aggrieved investors to seek redress for their economic losses under the laws to which perpetrators are subject. Without this protection, perpetrators of securities fraud within the United States are able to "export" the consequences of their misdeeds with little or no risk of being held responsible. Ensuring that the anti-fraud provisions of the securities laws are available to foreign investors furthers the interests of the United States, shareholders and investors worldwide, and foreign financial regulators.

The United States Court of Appeals for the Second Circuit's interpretation of Rule 10b-5 of the *Securities Exchange Act of 1934* in *Morrison v. National Australia Bank*, 547 F.3d 167 (2d Cir. 2008), should be reconsidered to ensure that foreign investors have the protections of the *Exchange Act's* anti-fraud provisions where they have suffered losses as a result of fraud committed in part or fully within the United States, where the United States conduct is material to the loss suffered.

ARGUMENT

I. Extra-territorial application of anti-fraud laws is an essential component in the prevention of international and intra-national fraud, and is in the interests of all investors

The problem of United States-based securities frauds afflicting foreign investors is one which, by its very nature, transcends national borders. Congress recognized the closely inter-connected nature of global financial markets in the *Exchange Act of 1934* itself. 15 U.S.C. §78b(2) ("prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries"). Thus, it is hardly unexpected that conduct occurring in one country may have significant effects on market participants in other countries. Congress recognized that in the *Exchange Act of 1934* too, as evidenced (for example) by its "statutory disqualification" from domestic activities of persons who have been expelled, suspended or denied trading privileges by a "foreign international securities exchange." 15 U.S.C. §78c(A)(39).

Addressing this problem necessarily requires an international perspective. Where the party committing a fraud resides in the United States, there are generally few or no legal options open to the foreign victims of that fraud to seek redress other than those provided under the United States legal system. Similar issues would surround the applicability of foreign laws to wrongdoers residing in other countries.

If the securities laws of the United States are found to be inapplicable to parties engaged in fraudulent conduct that causes loss to foreign investors, the cost or risk of the conduct involved to the perpetrators would be significantly reduced. Basic economic theory would dictate that such circumstances would make the United States a more attractive location for such conduct to occur. Conversely, ensuring that wrongdoers can be made to face the legal claims of all the parties they harm, including foreign investors, would provide a significant disincentive to such conduct taking place. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) ("to deny such jurisdiction may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations. [Denying jurisdiction] would, in effect, create a haven for such defrauders and manipulators."). Without the application of these laws, parties intending to commit securities frauds affecting foreign investors could conceivably operate with relative impunity within the United States. *See id.* (expressing reluctance "to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates'").

It is inconceivable that the United States Congress intended the *Securities Exchange Act of 1934* to permit the country to be a "safe haven" for parties intending to commit securities frauds. Not only would such a result be contrary to the express purposes of the legislation, but it would do considerable damage to the standing of the United States in investors' minds.

The inability to hold accountable the perpetrators of international securities frauds seriously impedes the efforts of many to deter such fraud, both within the United States and internationally. Such conduct is effectively deterred by ensuring that aggrieved parties have the ability to seek redress no matter where the conduct occurs; this requires as many countries as possible to ensure that their systems afford these rights to investors, in light of the unavoidably global nature of securities markets.

Regulation such as the anti-fraud provisions of the *Securities Exchange Act of 1934* is inherently costly for a country to implement. If foreign countries recognize that a country with the economic might and sophistication of the United States will not act to prevent United States-based wrongful conduct from adversely affecting foreign investors, there is a real risk that those countries will be less likely to enact a robust regulatory regime preventing securities fraud themselves. Should this situation persist for a large number of other countries, there would be a significant deterrent placed on international investments around the world.

For United States courts to hold that there is no jurisdiction where fraudulent conduct emanating from the United States harmed foreign investors, may lead to reciprocal responses by other jurisdictions, prohibiting United States investors from seeking economic damages where international fraudulent conduct harmed them. A failure of United States laws to adequately protect foreign investors from fraudulent conduct emanating within the United States may therefore lead to United States citizens lacking similar protections for their own foreign investments.

Conversely, ensuring that United States securities laws can be enforced against the perpetrators of frauds harming foreign investors would have a decidedly positive effect on United States-based investors as well. Foreign investors would be considerably more likely to invest in United States-based entities with the knowledge that they can avail themselves of the United States anti-fraud laws should they be needed. In this way, a broader interpretation of the *Securities Exchange Act of 1934* encourages foreign investment and increases the flow of foreign capital into the United States.

The *Amici* act to encourage high standards of corporate conduct and disclosure, which protect Australian as well as international investors. Protecting foreign investors from fraudulent conduct occurring overseas is one important way of ensuring that these aims can be met. In 2010, when the economy is global, and truly "international" companies trade their stock over securities exchanges throughout the world, it is essential for the optimal functioning of national and international securities markets that foreign investors are afforded the protection of laws such as the anti-fraud provisions of the *Securities Exchange Act of 1934*.

II. The securities laws are intended to regulate the United States-based conduct of United States companies

Where fraudulent or otherwise unlawful conduct occurs within the United States, and is committed by a United States citizen or entity registered to do business in the United States, or an entity required to make financial reports to United States regulators, the default position for law enforcement purposes must be that the conduct is to be subject to the laws of the United States, and ought to be judged by and according to them. Where such conduct victimizes a foreign party, the presumption that United States law applies should be no different than if the conduct harms a United States citizen. That presumption must remain in the absence of a compelling argument to the contrary.

Practical factors, such as the availability of factual and expert evidence, the cost and convenience of United States-based litigation to interested parties, and the expertise of United States courts, all strongly suggest that the most appropriate place for litigation concerning United States-based securities fraud with international effects is the United States. A defendant that disagrees may seek to have claims brought against it dismissed on the ground of *forum non conveniens*. *See generally Sinochem International Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). This is the appropriate basis on which a court ought to consider the most correct venue for such a claim; a restrictive interpretation of the *Securities Exchange Act of 1934* and its jurisdictional provisions ought not be used to supplant that ground as the initial consideration.

Shareholders such as those receiving the advice and benefits of the *Amici* require certainty as to the rights and protections afforded to investors in order to make investment decisions. If United States securities laws are found to be unavailable to foreign investors who have suffered losses as a result of a United States-based fraud, this would be a significant factor weighing against further or continued foreign investment in the United States.

III. The United States ought not "export" wrongful conduct occurring within its borders or by its citizens without providing a means for victimized parties to seek redress

The *Amicis'* purposes and programs within Australia encourage high standards of corporate behavior, which protects investors both domestic and foreign. As a part of this, the *Amici* encourage governments to ensure that adequate systems are in place to ensure that corporations and other entitles that fall short of the standards required of them can be held accountable by the parties they have harmed. The *Amici* encourage such accountability from all entities involved in investment transactions around the world.

If the anti-fraud provisions of the *Securities Exchange Act of 1934* are found to be unavailable to foreign plaintiffs, the foreign victims of frauds perpetrated in the United States would often be left without any means of recovering from the parties responsible. In this sense, the failure of the United States' legal and regulatory systems to provide adequate opportunity for redress would amount to the

United States exporting the adverse effects of wrongful conduct occurring on its territory to other innocent parties – certainly as innocent as those United States victims of the same fraud.

It is the *Amicis'* belief that such a situation cannot be justified. Investors, such as those likely to be most affected by such circumstances, are the cornerstone of financial systems in all developed nations, and foreign investors in particular play a significant and growing role in national economies, while placing a great deal of trust in foreign nations to adequately protect their investments. Putting foreign investors at such a disadvantage is a substantial disincentive to the injection of foreign capital into financial markets, would operate contrary to the development of increasingly open and internationally-connected financial markets, and is inequitable, to say the least.

The *Amici* therefore encourage governments and corporations to take responsibility for dealing with securities frauds, and to ensure that the burden of such wrongdoing is not automatically transferred to voiceless innocent foreign parties.

CONCLUSION

Based upon the forgoing and the arguments made by Petitioners, the *Amici* submit that this Court should determine that the anti-fraud provisions of the securities laws of the United States are available to foreign plaintiffs where they have been the victims of a fraud that has a material connection to conduct occurring in the United States.

Dated: January 26, 2010

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AMICUS CURIAE BRIEF

No. 08-1191

In The Supreme Court of the United States

ROBERT MORRISON, ET AL.

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Competitive Enterprise Institute (CEI), founded in 1984, is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise.[1] Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues.

Attorneys on CEI's staff have represented CEI or other groups or individuals before this Court or lower federal courts as principal parties or *amici curiae* in select constitutional or statutory matters. For example, CEI attorneys currently serve as co-counsel for the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861 (U.S. argued Dec. 7, 2009), now pending before this Court, and also filed an *amicus curiae* brief on behalf of climate scientists supporting the respondents in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

CEI respectfully aims to more fully inform the Court of this case's implications for a trend of increasing concern – foreign parties' use of U.S. courts to resolve disputes lacking a nexus to the United States, especially through abusive class

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[1] Letters from the parties granting blanket consent to the filing of all *amicus curiae* briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief.

action litigation. In this case, the problem has manifested itself in the form of foreign investors suing a foreign securities issuer from whom they purchased securities trading on an exchange abroad. The lawsuit, however, was brought pursuant to fraud in connection with the purchase or sale of securities under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. *See* 15 U.S.C. § 78j(b); 17 C.F.R. §240.10b-5.

These types of lawsuits, in which plaintiffs circumvent the legal systems of countries where their disputes arise to take advantage of what they see as the U.S. legal system's more favorable aspects, amount to nothing more than global forum shopping. The Second Circuit decision below, while reaching the correct result, allowed this much greater problem to continue festering in the securities fraud law arena. What allowed the Second Circuit to do so was an elaborate structure of judge-made law, developed over forty years, that lacked any foundation in the text of the statute at issue in its current form, legislative history of the statute in its original form, and this Court's precedents presuming against U.S. laws' extraterritorial application absent a clear expression of contrary congressional intent.

This Court now has the opportunity to restore order to a legal regime that has the potential to cause unwarranted harm to businesses with even minimal contacts in the United States, as well as the nation's economy and foreign policy as a whole. The

way to do so is to affirm the Second Circuit's decision solely on the grounds that the text of the statute at issue reflects no congressional intent to allow claims by foreign investors who purchase securities issued by a foreign entity on a foreign securities exchange. Anything less threatens to turn the United States into the world's securities law courthouse, as well as compound the economic and policy consequences that Respondents and supporting *amici* explained in their briefing below.

STATEMENT

A. Background

As opposed to lawsuits by individual plaintiffs, this case bears great significance on account of its implications for "foreign-cubed" or "f-cubed" litigation, whereby a U.S. lawsuit is "brought against a foreign issuer on behalf of a class that includes foreign investors who purchased securities on a foreign exchange."[2] Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 1, 1 (2007); *see also, e.g., In*

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[2] Petitioners in this case only consist of foreign plaintiffs. The trial court dismissed the sole domestic plaintiff for lack of standing due to a failure to allege a pecuniary loss from his purchase of American Depository Receipts in Respondent National Australia Bank that traded on the New York Stock Exchange. *See In re Nat'l Austl. Bank. Sec. Litig.*, No. 03 Civ. 6537, 2006 WL 3844465, at *8-9 (S.D.N.Y. Oct. 25, 2006). This brief nonetheless contends that the presumption against extraterritoriality applies equally to foreign plaintiffs who are members of a class alongside domestic plaintiffs.

re Vivendi Universal S.A. Sec. Litig., 241 F.R.D. 213 (S.D.N.Y. 2007); *In re Royal Dutch/Shell Transp. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005). The advent of such litigation has, according to Professor John Coffee of the Columbia University Law School, caused "sophisticated foreign issuer[s]" to "fear" that "listing on a U.S. exchange exposes [them] to bankrupting securities liabilities" if their stock prices were to fall sharply. These issuers would owe these liabilities "not simply to U.S. investors, but, more importantly, to a much larger worldwide class of foreign investors who acquired their shares outside the United States." John C. Coffee Jr., *Foreign Issuers Fear Global Class Actions*, NAT'L L.J., June 14, 2007; *see also* John C. Coffee Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, N.Y.L.J., Sept. 18, 2008, at 5.

This "fear" is not a mere figment of imagination. Foreign issuers, though they might list as little as one to two percent of their outstanding shares on U.S. exchanges, have paid two of the largest U.S. securities class action settlements in history according to one American Bar Association newsletter, Steven S. Kaufhold, *International Securities Class Actions: The World's Investors Come To U.S. Courts*, CADS REPORT (Class Action and Derivative Suit Committee Newsletter of the Section of Litigation, American Bar Association), Winter 2009 Vol. 19 No. 2 ($2.2 billion, assessed against Canada's Nortel Networks and $1.1 billion assessed against the Netherlands' Royal Ahold NV); *see also In re Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004).

The possibility that U.S. courts may act as forums in securities class actions has also had a profound impact abroad legally, if not politically and economically. More recently, Royal Dutch Shell plc, the largest company by revenue in the Netherlands, not to mention the world, settled roughly $450 million dollars' worth of securities claims in the Netherlands and used the settlement to successfully argue against a New Jersey federal court's exercise of subject matter jurisdiction. *See In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007); Fortune Global 500, http://money.cnn.com/magazines/fortune/global500/2009/ (last visited Feb. 25, 2010).

A jury verdict only weeks ago highlights the unprecedented financial stakes underlying f-cubed litigation that the case at bar may not make readily apparent. On January 29, 2010, a New York federal jury, after a trial that lasted nearly four months and 14 days of deliberations, concluded that French media conglomerate Vivendi S.A. misled investors about the company's financial condition on 57 different occasions in relation to a series of mergers and acquisitions between 2000 and 2002, inflating the company's stock by as much as $11 dollars per share. *Court Finds Vivendi Liable For Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3. Lawyers for the plaintiffs stated that the potential damages could amount to $9.3 billion dollars, the largest securities class action verdict in history. *See id.* Nonetheless, a lawyer for Vivendi stated that estimating actual damages at this stage was impossible because both the number of investors in

the class and who would seek payouts remained unclear. *See id.*

This verdict followed over seven years of litigation, during which Vivendi, in contrast to Respondents, unsuccessfully challenged the trial court's subject matter jurisdiction over the claims brought by foreign class members who had acquired the company's ordinary shares on foreign exchanges. *See In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 169 (S.D.N.Y. 2003) (Baer, J.). F-cubed class actions' enormous overall complexity was further demonstrated when the trial court grappled with the issue of which foreign plaintiffs to certify. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 95-108 (S.D.N.Y. 2007) (Holwell, J.). As part of this inquiry, the trial court examined the laws of the countries of each of the plaintiffs involved and, to preclude a double recovery, dismissed those plaintiffs from countries that would not grant *res judicata* effect to a U.S. class action judgment.[3] *See*

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[3] The trial court had to consider several issues before even beginning this analysis. A class action may proceed if, in addition to a numerosity of plaintiffs making joinder impractical, common legal or factual questions, claims and defenses of representative parties that are typical of the class's claims and defenses, and representative parties that will fairly and adequately protect the class's interests, the court finds that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(a),(b)(3). One matter pertinent to this finding was "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). A court must consequently, *inter alia*, "evaluate

id. American, English, French, and Dutch plaintiffs were ultimately certified, while German and Austrian plaintiffs were not. *See id.* All these factors illustrate how an f-cubed class action is potentially unlike any other class action in terms of financial stakes, global reach, and legal complexity.

The case law governing whether f-cubed litigation can proceed sets forth two tests, developed over forty years and stemming in large part from policy considerations, for determining subject matter jurisdiction over securities law claims – a "conduct" test evaluating the extent to which misconduct occurred in the United States and an "effects" test considering whether foreign activities substantially affected U.S. investors and securities markets. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (securities laws apply extraterritorially when necessary to preclude conduct abroad from injuring American investors); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (U.S. securities laws encompass extraterritorial activity if it substantially affects U.S. investors or markets); *IIT v. Vencap, Ltd. ("Vencap")*, 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."); *Securities and Exchange Commission ("SEC") v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977)

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whether allowing a [class] action to proceed will prevent the duplication of effort and the possibility of inconsistent results." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 (3d ed.2005).

("We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"). Courts have applied these tests individually or jointly. *Compare Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) ("[A]n admixture or combination of the two [tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."), *with Robinson v. TCI/U.S. West Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (satisfying either test allows for subject matter jurisdiction). Yet aside from lacking a basic statutory foundation, these tests are also so fact-bound that inconsistent holdings have emerged even within circuits and district courts.

B. Case Summary And Decisions Below

The facts of the instant case are easy to distill. But this simplicity is deceptive if one really wants to get an accurate sense of how complicated f-cubed securities class actions really are. The class certified in the *Vivendi* case previously discussed contained plaintiffs from the United States and five foreign countries who owned shares in a multinational conglomerate with stock trading on two stock exchanges (i.e., the New York Stock Exchange, where shares were primarily held by U.S. investors, and the Paris Bourse, where shares were primarily held by French and other non-U.S. investors). *See In re Vivendi*, 242 F.R.D. at 81, 95-108. Royal Dutch Shell stock trades on the New York Stock Exchange, the London Stock Exchange, and the Amsterdam

Stock Exchange. Royal Dutch Shell, http://www.shell.com/home/content/investor/share_price/share_price_summary.html (last visited Feb. 25, 2010). In contrast, the instant case solely concerns Australian investors who purchased shares in Respondent National Australia Bank ("NAB") trading on the Australian Securities Exchange.[4] *See Morrison v. Nat'l Austl. Bank*, 547 F.3d 167, 168 (2d Cir. 2008). Simply put, Petitioners have alleged accounting misconduct at an NAB Florida subsidiary, HomeSide Lending, Inc., that, when announced by NAB management in Australia, led to a drop in the price of NAB's Australian shares (i.e., when NAB management announced that the accounting figures at issue were false). *See id.* at 168-70.

The district court dismissed the case for lack of subject matter jurisdiction because "a significant, if not predominant, amount of the material conduct in this case occurred a half-world away." *In re Nat'l Austl. Bank. Sec. Litig.*, 2006 WL 3844465, at *7. In considering Petitioners' appeal, the Second Circuit invited the SEC to submit an *amicus* brief expressing its views on the case and the issue of extraterritorial application of U.S. securities laws. The SEC consequently proposed the following standard: "The antifraud provisions of the securities

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[4] *But see supra* note 2 (the trial court dismissed the sole U.S. plaintiff for lack of standing and the decision was not appealed). Note also that NAB stock trades not only on the Australian Securities Exchange and the New York Stock Exchange, but also on the London Stock Exchange, Tokyo stock exchange, and the New Zealand stock exchange. *See Morrison*, 547 F.3d at 168.

laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme." Brief of the Securities and Exchange Commission as *Amicus Curiae* In Response To The Court's Request in *Morrison v. Nat'l Austl. Bank*, No. 07-0583-cv (U.S. Court of Appeals for the Second Circuit) at 2. The Second Circuit then upheld the district court's dismissal because of the case's particular facts and rejected the proposed SEC standard. *Morrison*, 547 F.3d at 172-77.

But the Second Circuit also refused to establish a bright-line rule against f-cubed actions as Respondents had requested, finding that any potential conflict between U.S. antifraud laws and those of foreign nations did not require the "jettisoning" of the conducts and effects test. *Id.* at 175. The Court reasoned that (a) foreign jurisdictions would appreciate the antifraud efforts of U.S. courts, (b) that the Exchange Act meant to prevent both foreign and domestic parties from staging frauds from the United States, and (c) that exercising jurisdiction in f-cubed cases could best further this purpose. *See id.*

Views varied in regard to the decision's impact on securities class action litigation. Professor Coffee stated: "It's essentially a chill, but not a death blow to the [f]-cubed class action." Melissa Klein Aguilar, *Ruling Increases Scrutiny of F-Cubed Lawsuits*, COMPLIANCE WEEK, Nov. 11, 2008,

http://www.complianceweek.com/article/5143/ruling-increases-scrutiny-of-f-cubed-lawsuits. But the decision stated: "A much stronger case would exist, for example, for the exercise of subject matter jurisdiction in a case where the American subsidiary of a foreign corporation issued fraudulent statements or pronouncements *from the United States* impacting the value of securities trading on foreign exchanges." *Morrison*, 547 F.3d at 175 (emphasis added). In this regard, a jury has found Vivendi to be one such foreign corporation.[5]

SUMMARY OF ARGUMENT

This case concerns a very straightforward question of statutory interpretation—may foreign investors bring claims under Section 10(b) of the Exchange Act in regard to the purchase or sale of foreign securities from foreign issuers on foreign exchanges? This Court should, quite simply, answer "no" by unambiguously advancing a reading of the Exchange Act that is consistent with what the statute in its current form actually says. In support of this conclusion, the Court should acknowledge that the legislative history surrounding the Exchange Act in its original form evinces no congressional intent to grant foreign purchasers of

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[5] The complaint in the Vivendi case states that fraudulent statements were made from the United States in connection with a series of acquisitions in a wide array of industries, including Texas-based Waste Management, Inc., California-based MP3.com, Inc., Massachusetts based Houghton Mifflin Co., and New York-based USA Networks. *See* First Amended Consolidated Class Action Complaint, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ 5571 (S.D.N.Y.) ¶¶ 23-24.

securities trading on foreign exchanges from foreign issuers a right of redress in U.S. courts. Finally, in the context of Section 10(b) of the Exchange Act, the Court should reiterate its own precedents presuming that U.S. laws do not apply beyond U.S. territorial boundaries unless Congress has clearly expressed its intent for such extraterritorial reach.

Affirming the Second Circuit's decision with anything less simply will not do. In addition to the inconsistent case law surrounding f-cubed litigation, such precedents of this Court, rightly or wrongly decided, as *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and subsequent lower court jurisprudence concerning the scope of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, indicate that the more discretionary or fact-specific a standard for interpreting a statute a higher court establishes, the greater the opportunity for misinterpretation by lower courts. Such misinterpretation often takes the form of expanding the standard beyond what the higher court, and ultimately Congress, originally intended, thereby endangering the basic premise upon which the standard itself was based. In regard to securities class actions, as the case law following *Sosa* indicates, this type of aftermath will consist of a steady drift away from a framework of legal predictability for global companies. And not knowing what the law is at a given place of operation entails unknown risks of liability, which can compound into economic harm, as well as confrontation with the executive and legislative branches.

ARGUMENT

Because the resolution of the extra-territoriality issue does not depend on the question of subject matter jurisdiction, this Court can decide whether the claims at bar are even justiciable in the first place. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 (2006) ("[N]othing [depended on] 'whether [the issue] was technically jurisdictional.'") (citation omitted); *see also, e.g., F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 163-75 (2004) (applying this very approach to an appellate court decision that was procedurally a matter of subject matter jurisdiction), *rev'g* 315 F.3d 338, 341 (D.C. Cir. 2003).

I. Section 10(b) Of The Exchange Act And Rule 10b-5 Do Not Permit Claims By Foreign Investors Against Foreign Securities Issuers In Connection With Securities Trading Abroad

The plain language of the Exchange Act in its current form extends no private right of action under Section 10(b) to foreign investors who purchase or sell securities from foreign issuers on exchanges abroad. Neither do Petitioners indicate any legislative history surrounding the Exchange Act's initial enactment that shows Congress even contemplated such a right. This Court should consequently reiterate its longstanding presumption against laws' extraterritorial application absent express congressional intent to the contrary.

A. The Exchange Act's plain language does not allow f-cubed litigation

Section 10(b) of the Exchange Act prohibits "any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails" from using "in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance" proscribed by the SEC. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5. But the Exchange Act's preamble shows a definite focus on domestic investors and markets and discusses foreign commerce in this specific context.

Initially, the preamble states that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a *national public interest*." 15 U.S.C. § 78b (emphasis added). These "transactions in securities," the preamble thereafter continues, are "carried on in large volume by the public generally and in large part originate *outside the States in which the exchanges and over-the-counter markets are located* and/ or are *effected by means of the mails and instrumentalities of interstate commerce*." *Id.* (emphasis added). The Exchange Act defines the term "the States" as "*any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States*." *Id.* § 78c (emphasis added).

Under the phrase's plain meaning, then, transactions could commence "outside the States," or outside the United States and its territories, and be facilitated via interstate or international commerce. But the only exchanges and markets mentioned, where these transactions are finally completed, are exchanges and markets located in the United States. This wording at least implies an "exchange-based" focus – an approach "based on the country that regulates the exchange on which the transaction takes place" and that excludes "transactions on exchanges [and markets] other than [United States] exchanges [and markets]." Stephen J. Choi and Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 490 (2009) (article proposes that courts adopt an "exchange-based" presumptive rule in determining the applicable class in a Rule 10b-5 class action lawsuit and presume no jurisdiction in such a lawsuit for a foreign investor trading outside the United States).

Neither does Section 30 of the Exchange Act, which explicitly concerns foreign securities exchanges (i.e., it is entitled "Foreign Securities Exchanges"), support the private rights that f-cubed lawsuits assert. Under Section 30(a), the SEC can adopt rules and regulations covering transactions in securities of U.S. issuers that are "effect[ed]" by a broker or dealer "on an exchange *not within or subject to the jurisdiction of the United States*," rules and regulations that brokers and dealers cannot violate. 15 U.S.C. § 78dd(a) (emphasis added). This provision applies to the activities of

U.S., and not foreign issuers, on foreign exchanges. In any event, what activities this provision precludes remains unclear because the SEC has enacted no rule implementing this provision as it has done with Section 10(b).

Neither has the SEC promulgated any rule to implement Section 30(b). This provision states that the Exchange Act "shall not apply to any person insofar as he transacts a business in securities *without the jurisdiction of the United States*, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." *Id.* § 78dd(b) (emphasis added).

Perhaps this situation contributed to the Second Circuit's observation that Congress, in enacting the Exchange Act, "omitted any discussion of its application to transactions taking place outside of the United States." *Morrison*, 547 F.3d at 170. In fact, after considering the SEC's proposed standard for extraterritorial application, the Second Circuit "respectfully urge[d] that this significant omission receive the appropriate attention of Congress and the [SEC]." *Id.* n.4.

This Court should also approach this entire analysis from the perspective that Section 10(b) explicitly authorizes no private right of action. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("The § 10(b) private cause of action is a judicial construct that Congress

did not enact in the text of the relevant statutes."). As a result, only Congress has the power to expand this judge-made right.[6] *Id.* at 165.

If anything, the Exchange Act's references to foreign regulatory authorities place an even higher burden on foreign f-cubed plaintiffs to prove why their own countries' enforcement mechanisms are inadequate. A major issue in dispute throughout this litigation has been whether allowing Petitioners' lawsuit to proceed will result in "unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. This Court should consider whether the Exchange Act's acknowledgement that such authority exists lends credence to Respondents' comity concerns.

The Exchange Act refers to "foreign securities authorit[ies]," or foreign governments or organizations empowered by a foreign government to administer or enforce its laws as they relate to securities matters." 15 U.S.C. § 78c. Section 15 of the Exchange Act, in turn, empowers the SEC to

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[6] Very significantly, the United States, in opposing certiorari in this case, suggested a higher standard for extraterritorial application of the Exchange Act in private actions. *See* Brief For The United States As Amicus Curiae, *Morrison v. Nat'l Austl. Bank, Ltd.*, No. 08-1191 (U.S. Supreme Court) at 10-11. "[I]n cases involving transnational fraud, the private plaintiff should be required to demonstrate a direct causal link between his injury and the component of the scheme that occurred in the United States." *Id.* at 10. But the SEC could bring an enforcement action on a fraudulent scheme bearing a "*sufficient* connection to the United States." *Id.* at 11. At least as applied to private actions, the SEC's interpretation nonetheless still contradicts the Exchange Act's plain meaning.

discipline brokers or dealers who make false or misleading statements on such authorities' applications or reports or who violate or aid and abet in any violation of foreign statutes governing securities transactions. 15 U.S.C. § 78o. And Section 21(a)(2) allows the SEC to provide assistance to a foreign securities authority in an investigation to "determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the ... authority administers or enforces." 15 U.S.C. § 78u. These provisions addressing cooperation with foreign countries' efforts to enforce *their own* securities laws would be inconsistent with allowing those countries' citizens to co-opt those same laws in a U.S. court.

In any event, this Court has examined other statutes' extraterritorial reach and acknowledged that Congress certainly knows how to regulate extraterritorial activity "when it desires to do so." *Equal Employment Opportunity Comm'n v. Arabian Am. Oil. Co. ("Aramco")*, 499 U.S. 244, 258 (1991) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Section 30A of the Exchange Act, an amendment to the Exchange Act that was actually part of the Foreign Corrupt Practices Act ("FCPA") of 1977, has a specified extraterritorial reach in its prohibition of the bribery of foreign officials to obtain or retain business (though it provides for no private right of action. *See* 15 U.S.C. §§ 78dd-1, *et seq.* FCPA amendments in 1998 further clarified and expanded this extraterritorial reach. *See id.* These provisions referring to foreign activities and authorities further

show why this Court should not try to predict Congress's disposition in regard to Section 10(b)'s "extraterritorial thrust" for private lawsuits. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458 (2007).

B. The legislative history surrounding the Exchange Act's initial enactment evidences no support for any private right of action under Section 10(b)

Petitioners have indicated no legislative history surrounding the Exchange Act's original enactment that indicates any congressional intent to allow the type of claim they are pursuing. And they cannot because any such intent, using the statute's text as a guide, did not become law. As this Court noted in first acknowledging the judicially created right of action under Section 10(b) back in 1975, the first court decision ever holding that such a right existed was issued in 1946. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (citing *Kardon v. Nat'l Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946). The Exchange Act was enacted in 1934.

In any event, one detailed study by Professor Margaret Sachs of the University of Georgia Law School of the legislative history surrounding the Exchange Act's initial enactment, apparently one of very few, if not the only one, on the subject, points to legislators primarily concerned with protecting domestic, as opposed to foreign, investors. *See* Margaret Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28

COLUM. J. TRANSNAT'L L. 677, 694-99 (1990). These legislators concerned themselves with the risks born by *domestic* investors who traded in *foreign* securities domestically or abroad. *See id.* In fact, the study even indicates that the language "between any foreign country and any State" denotes no extraterritorial scope and was simply added to ensure statutory coverage of foreign securities trading in the United States. *See id.* at 700-701 (citation omitted).

C. This Court's longstanding precedents preclude Section 10(b)'s extraterritorial application for a private action

This Court's longstanding precedents regarding extraterritoriality strongly support the previous interpretations of the Exchange Act's text and legislative history. Congress has the power to enact laws applicable beyond the territorial boundaries of the United States. *Aramco*, 499 U.S. at 248 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). But whether Congress has actually exercised this authority is a matter of statutory construction. *Aramco*, 499 U.S. at 248.

"The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285 (citing *Blackmer v. United States*, 284 U.S. 421, 437

(1932)). Indeed, as noted in an opinion by Justice Holmes, this Court has long acknowledged that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions, rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.*

To apply extraterritorially, then, a statute must indicate "a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285. Courts may consider "all available evidence about the meaning" of a statute to determine the extent, if any, of the statute's extraterritoriality. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (analysis of immigration statute's text, structure, and legislative history proved that the statute did not apply extraterritorially). To that effect, "Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." *Aramco*, 499 U.S. at 258 (mentioning numerous statutes specifically defining extraterritorial application). The FCPA, as

discussed previously, is one such example. *See* 15 U.S.C. §§ 78dd-1, *et seq.* But absent "an affirmative intention of the Congress clearly expressed," the Court should presume that a statute solely applies domestically. *Aramco*, 499 U.S. at 248 (quoting *Benz*, 353 U.S. at 147).[7]

Words of "universal scope" such as "any," as in the application of Section 10(b) and Rule 10b-5 to the "purchase or sale of *any* security," do not constitute such an affirmative intention. 17 C.F.R. § 240.10b-5 (emphasis added); *Am. Banana Co.*, 213 U.S. at 357. Justice Holmes observed that "[a]ll legislation is *prima facie* territorial." *Am. Banana Co.*, 213 U.S. at

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[7] Petitioners refer to the Court's 2005 decision in *Spector v. Norwegian Cruise Line Ltd.*, which held that some, if not all, requirements set forth by Title III of the Americans with Disabilities Act potentially applied to foreign-flagged vessels in United States waters, as a basis for presuming "that Congress intends to legislate for all conduct within the United States regardless of the potential interest of other nations in such conduct." Brief For Petitioners at 34 (citing *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125-27, 131-32 (2005)). *Spector*, however, distinguished between "matters that affect only the internal order of the ship when there is no effect on United States interests" and matters that affect, in whole or in part, "the welfare of United States residents or territory." *Spector*, 545 U.S. at 133. "The relevant category for which the Court demands a clear congressional statement, then, consists not of all applications of a statute to foreign-flag vessels *but only those applications that would interfere with the foreign vessel's internal affairs*." *Id.* at 132 (emphasis added). *Spector* consequently supports the use of the traditional framework for determining extraterritoriality on account of how this case, and, by their nature, f-cubed actions implicate interests other than those of the United States.

357 (1909). He continued immediately thereafter: "Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken as a matter of course to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch." *Id.*

This Court has adhered to this very approach. *See Small v. United States*, 544 U.S. 385, 387 (2005) (framing the issue in the case as whether the prohibition on possessing a firearm by any person "who has been convicted in *any court*" applied only to domestic convictions or to foreign convictions as well). Referring to "the commonsense notion that Congress generally legislates with domestic concerns in mind," the Court did not deviate from the longstanding presumption that Congress ordinarily intends its statutes to have solely domestic application. *Id.* at 388 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (holding that the Federal Tort Claims Act's waiver of sovereign immunity does not apply to tort claims arising in Antarctica); *see also United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C.J.) ("The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."). Nor should the Court do so here.

II. Only The Presumption Against Extraterritoriality Will Sufficiently Guide Lower Courts

In its decision below, the Second Circuit concluded that "the potential conflict between our anti-fraud laws and those of foreign nations does not require the jettisoning of our conducts and effects tests for 'foreign-cubed' securities fraud actions and their replacement with [a] bright-line ban." *Morrison*, 547 F.3d at 175. The decision consequently paid little attention to the "parade of horribles that [Respondents and *amici*] claim would result if American courts exercised subject matter jurisdiction over such actions." *Id.* at 174 (referring to briefing discussing the potential for bringing U.S. "securities laws into conflict with those of other jurisdictions," "undermin[ing] the competitiveness and effective operation of American securities markets, discourag[ing] cross-border economic activity, and ... duplicative litigation").

Why was the Second Circuit's decision lacking if it reached the correct result? When misused, the class action lawsuit is likely one of the most destructive forces a company can face. One previous comment by this Court as to private securities fraud actions is especially illustrative in regard to securities class actions: "Private securities fraud actions ... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 313 (2007). And yet securities class

actions seem to keep morphing into different forms. In sanctioning private Rule 10b-5 litigation partially on account of its widespread judicial acceptance and congressional inaction to the contrary over thirty years, this Court rightly acknowledged that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739.

This Court now has a chance to stop a form of class action litigation that is unprecedented in such vexatiousness. And only a decision clearly precluding all foreign investors from suing foreign defendants under Section 10(b) in relation to foreign securities transactions - a clear and unambiguous standard, rather than a fact-specific one that is "inherently unpredictable" - will succeed in doing that and pressuring Congress and the SEC to consider these issues, as it is their duty to do. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (citations omitted). Anything less will risk misinterpretations by lower courts, misinterpretations of the sort that expand, rather than restrict, discretionary standards. And such expansion can be so great that the standards themselves become meaningless.

That this consequence will occur in terms of f-cubed litigation is by no means a certainty. But this Court should be mindful of how the situation it faces in regard to the instant case – the chance to set forth an unambiguous standard that could bring clarity to unsupported case law in a subject area – resembles

the circumstances of the lower court decisions concerning the ATS when the *Sosa* case was considered.

As this Court mentioned, Judge Henry Friendly called the ATS a "legal Lohengrin ... no one seems to know whence it came." *Sosa*, 542 U.S. at 712 (citing *Vencap*, 519 F.2d at 1015). This law was passed by the first Congress as part of the Judiciary Act of 1789 and confers original jurisdiction on federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Yet until 1980, the ATS was very rarely a subject of litigation.

In considering *Sosa*, the Court had to decide whether the ATS allowed for private rights of action at all. *See Sosa*, 542 U.S. at 712-738. That situation mirrored the situation here, where the Court must also to decide whether to extend a private right of action, albeit one that it has already accepted exists for domestic investors. *See id.* Ruling that the statute was jurisdictional, as the government argued, would have, as here, invalidated a whole category of arguably unfounded case law that lower courts had developed without this Court's guidance, as well as precluded more such cases. The Court was faced with making a decision on the ATS's plain meaning or looking to other sources of interpretation. *See id.* The case also raised questions of the extent to which the Court should defer to the political branches. *See id.*

We submit that the Court, rightly or wrongly, tried to have it both ways. It concluded that the ATS was a jurisdictional statute, but used a number of historical sources to hold that the ATS could also serve as the basis for a limited class of private lawsuits under international law. *See id.* Then the Court imposed what appeared to be restrictive guidelines instructing lower courts to exercise "great caution" in entertaining ATS lawsuits. *See id.* at 728. There too, the Court was concerned about how these types of lawsuits involved extraterritorial conduct and a potential impact on U.S. foreign relations. *See id.* at 727-28.

Subsequent ATS litigation, however, did not bear out the optimistic view that these lawsuits would be limited. The lower courts continued to hear the same sorts of cases as they had before based on very speculative theories. Often, the events at the heart of a dispute were not connected to the United States. In sum, the Court set a discretionary standard. And that standard was misinterpreted, expanded, and abused.

This brief does not seek to convince this Court to extend its focus in this case to the ATS, nor even to question the *Sosa* decision.[8] But subsequent lower court jurisprudence has misconstrued *Sosa* to such a degree that it provides good reason for this Court to avoid a Second Circuit-like discretionary approach in this case. *Sosa*'s aftermath, right or wrong, quite simply shows such an approach's shortcomings and

[8] To the extent the Court may construe this brief as questioning or disagreeing with *Sosa*, we note that we do so with respect.

how lower court jurisprudence may consequently evolve in a way the Court never intended.

A. Pre-*Sosa* ATS case law resembles past f-cubed litigation in its lack of a statutory foundation

The ATS was, in a sense, brought back to life by the Second Circuit's decision in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In that case, a federal court found that the ATS allowed jurisdiction over a claim by Paraguayan plaintiffs against a Paraguayan government official for the torture-killing of a family member in Paraguay. *Filartiga*, 630 F.2d at 878-80. The Second Circuit found that torture conducted under "color of law" violated the "law of nations," even when conducted by a government agent against that government's own nationals. *Id.* at 887.

Thereafter, as lower courts developed "tests" without Supreme Court guidance, to determine Section 10(b)'s extraterritorial scope, ATS jurisprudence also morphed into more generalized class actions. In the ATS's case, these class actions were also massive, global, and targeted at major multinational corporations. The criteria for being targeted, however, was not a decline in company share price, but the fact that a company did business in a country governed by leaders with shoddy human rights records. ATS lawsuits primarily focused on suing these companies for somehow aiding and abetting these human rights violations.

An example of such a lawsuit concerns the military government of Myanmar (Burma). In 1996, a class of Myanmar villagers filed suit in California federal court against Unocal Corporation and other defendants involved in a natural gas extraction joint venture with the Myanmar regime. *See Doe v. Unocal Corp.*, 395 F.3d 932, 937-42 (9th Cir, 2002). (C.D. Cal. 1997). These plaintiffs alleged that Unocal and the other defendants were complicit in forced labor to complete the project's pipeline directed by the Myanmar military. *See id.* The district court found that ATS jurisdiction encompassed corporations that aided government human rights violations. *See id.* But the court later granted summary judgment in Unocal's favor because, as a matter of fact, Unocal was not sufficiently connected to the pipeline's actual construction for a claim to proceed. *See id.* at 942-44. Reversing in part, a Ninth Circuit panel held that the district court had erred in holding that the plaintiffs had to prove Unocal's control over the Myanmar military's actions. *See id.* at 949-57. The plaintiffs, instead, had to show that Unocal "knowingly assisted" the military. Under that standard, the Ninth Circuit held, sufficient evidence had been produced for the case to proceed. *See id.* The case ultimately settled.

By the end of the decade, ATS complaints had greatly departed from the factual scenario *Filartiga* had presented. No longer restricting themselves to claims concerning political persecution, plaintiffs were now alleging claims based on environmental damage. *See Beanal v. Freeport-McMoran, Inc.*, 197

F.3d 161 (5th Cir. 1999) (citing how defendants' mining operations resulted in "environmental abuses"); *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116 (C.D. Cal. 2002) (complaint alleged the alteration of the climate in the Papua New Guinean rain forest). And all these developments occurred in the unfounded context of private citizens suing for enforcement of treaties and international law, when, as with plaintiffs in private Section 10(b) actions, they had no statutory right to do so. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984).

B. This Court failed to stem ATS litigation with its discretionary standard

Sosa concerned a lawsuit against Drug Enforcement Agency officials for forcibly rendering to the United States a Mexican physician suspected of having aided in an agent's torture in Mexico. *Sosa*, 542 U.S. at 697-99. The U.S. government argued that the ATS was merely a jurisdictional statute that created no private rights of action. *See id.* at 712-20. This Court held, in accordance with the government's position, that the ATS was jurisdictional and dismissed the lawsuit. *See id.* at 724. But the Court also held that, in extremely rare instances, federal common law might supply a cause of action for violations of the law of nations. *See id.* at 724-25. Then again, there was "no basis to suspect" that Congress had, according to the Court's research, anything in mind beyond "violation of safe conducts, infringements of the rights of ambassadors, and piracy." *Id.* at 724.

As a result, courts' power to allow private claims under the law of nations should be subject to "vigilant doorkeeping" and great caution was to be exercised when "adapting the law of nations to private rights." *Id.* at 728-29. *Sosa*, then, understood the potential for misuse of such private claims and how they might interfere with the political government branches' management of economic and foreign affairs. *See id.* at 724-28.

C. Lower courts have abused the discretion granted them in *Sosa*

Though the door for ATS claims was subject to "vigilant doorkeeping" and "great caution," the door has since been ripped off from its hinges. *Id.* at 728-29. Claimants continued to file the same sorts of ATS claims. And the lower courts differed in how to approach them.

Recently, for example, the Second Circuit has ruled in a case concerning a Canadian energy company with operations in Sudan, whereby, *inter alia*, the country's infrastructural development projects allegedly assisted the Sudanese military in committing human rights violations (i.e., building roads and airstrips knowing the Sudanese military would use them in attacking civilians). *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 244-56 (2d Cir. 2009). The court held that the ATS, pursuant to international law, encompassed accessorial liability where (1) a defendant assisted a principal in a manner that substantially effected the

perpetration of a human rights violation and (2) did so with the purpose of facilitating that violation. *See id.* at 259. .

But other courts have disagreed with this theory of accessorial liability. Another Second Circuit panel stated that such liability was feasible, but had to be defined by domestic standards. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d cir. 2007. The Eleventh Circuit has set the bar lower – accessorial liability theories were permissible only if defendants were aware that their conduct would facilitate a harm; plaintiffs did not need a purpose or intent. *Barrueto v. Fernandez Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148, 1161 (11th Cir. 2005).

Of all these appellate rulings, one characteristic stands out. They all sanctioned a theory of ATS liability – accessorial liability – that was extensively advocated before *Sosa*. *Sosa* cautioned against an extensive ATS scope and mentioned nothing about accessorial liability. Yet the appellate courts still followed their own path.

These courts were able to do so because this Court, rightly or wrongly, had not said no (i.e., restricting its ruling to whether the ATS was jurisdictional or not). If post-*Sosa* jurisprudence demonstrates anything, it is the huge risk that a higher court takes when it allows the use of a discretionary standard.

D. A mere affirmance of the Second Circuit without a bright-line standard concerning Section 10(b)'s extraterritoriality will create the same confusion that has occurred in post-*Sosa* ATS litigation.

The appellate case law the Court confronts in the instant case contains the seeds of similar confusion. One only needs to examine the trial court's opinion for an excellent example – mention of two other f-cubed cases with fact patterns practically identical to the case at bar where the other judges chose to exercise subject matter jurisdiction. In one case, jurisdiction existed over a class of foreign plaintiffs, who alleged that: (i) "accounting improprieties" at a United States subsidiary led to significant errors in its financial statements and (ii) that such statements were incorporated into the financial statements of the foreign parent, which were distributed and relied upon by investors abroad. *In re Nat'l Austl. Bank. Sec. Litig.*, 2006 WL 3844465, at *7 n.8 (citing *In re Alstom S.A. Sec. Litig.*, 406 F.Supp.2d 346, 362-63, 387 (S.D.N.Y. 2005).

And in another case, the court found that jurisdiction existed over a class of foreign plaintiffs who alleged that: (i) the Canadian based Gaming Lottery Corporation ("GLC") had acquired a United States subsidiary, Specialty Manufacturing Inc. ("SM"), without obtaining state regulatory approval; (ii) falsely represented to the investing public that this acquisition was completed when it had not been; (iii) consolidated SM's financial results with those of

GLC; and (iv) misled the plaintiffs by making announcements of other United States acquisitions that were certain to fail once those state regulators learned of GLC's deception concerning SM. *See id.* (citing *In re Gaming Lottery Sec. Litig.*, 58 F.Supp.2d 62, 65 (S.D.N.Y.1999). The trial judge had only one explanation for why she ruled differently in the instant case than her two colleagues: "Regardless of the jurisdictional decisions in *Alstom* and *Gaming Lottery,* I believe that the allegations before me in this case warrant a different result." *See id.* This was a rather subjective approach. Perhaps one of the other two trial judges spoke accurately, then, when he said that "any notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom*, 406 F. Supp. 2d at 375.

What standard for f-cubed lawsuits should this Court adopt if not for the presumption against extraterritoriality? As with the ATS, the plethora of policy questions the Court will wade into should it not expressly adopt such a standard are really the business of Congress.

Indeed, given the recent economic turmoil and shocking financial scandals, perhaps the timing of this case is ideal. If the Court defers to Congress by validating this presumption, then f-cubed class actions will receive the congressional attention, if any, that they merit.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed on the basis of one expressly stated reason: this case and f-cubed suits based on Section 10(b) cannot be pursued because of the presumption against extra-territoriality embodied in the Exchange Act and this Court's precedents.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, ET AL.,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR EUROPEAN AERONAUTIC DEFENCE & SPACE CO. N.V., ALSTOM SA, LAGARDÈRE GROUPE SCA, THALES SA, TECHNIP SA AND VIVENDI SA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are multinational corporations headquartered in Europe whose common shares are traded on European exchanges. *Amici*'s disclosures to investors are extensively regulated by the laws of the European Union ("EU") and several of its member

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Letters from the parties consenting to the filing of all *amicus* briefs have been filed with the Clerk of the Court.

states, and their financial statements are prepared in accordance with the International Financial Reporting Standards endorsed by the EU, rather than the Generally Accepted Accounting Principles applied in the United States. *Amici* include European Aeronautic Defence & Space Co. N.V. ("EADS"), Alstom SA, Lagardère Groupe SCA, Technip SA, Thales SA and Vivendi SA.

EADS is Europe's premier aerospace and defense company; its subsidiaries include Airbus S.A.S., a leading manufacturer of commercial and military aircraft. EADS is organized under Dutch law and registered in the Netherlands, with executive offices in France and Germany. The Republic of France holds, directly and indirectly, approximately 15 percent of EADS' shares, while the Kingdom of Spain holds approximately five percent. EADS common stock is listed on exchanges in France, Germany, and Spain, but is not listed on any United States exchange.[2] EADS is currently defending a securities class action in the United States, brought by U.S. purchasers of EADS stock on foreign exchanges, which raises issues closely related to those presented here. *See In re European Aeronautic Defence & Space Co. Sec. Litig.*, No. 1:08-cv-05389-WHP (S.D.N.Y. filed June 12, 2008).

Alstom SA is a French company providing equipment and services for the power generation and rail transportation industries. Alstom is headquartered in Levallois-Perret, France, and its stock is listed on

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[2] American Depositary Receipts ("ADRs") for common shares of EADS stock are traded in the United States, but this ADR facility is unsponsored, meaning that it was established by depository banks without any involvement by EADS.

the Paris exchange. Alstom's stock is not listed on any U.S. exchange, and Alstom has discontinued its American Depository Shares ("ADS") program in the United States. Alstom has been sued in the United States by a class of purchasers of Alstom's securities (including purchasers in France, England and the Netherlands) for alleged violations of Section 10(b) of the Securities Exchange Act (the "Exchange Act") and Rule 10b-5. *See, e.g., In re Alstom Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008).

Lagardère Groupe SCA is a global conglomerate engaged in book publishing, print, audiovisual and digital media, travel and sporting rights. Lagardère is a public limited partnership organized under French law. Its head office is in Paris and its shares are listed on the Paris exchange. Its securities are not listed on any U.S. exchange. Lagardère was named as a defendant in a securities class action filed in the United States in 2008, *Bobin v. Lagardère SA*, No. 1:08-cv-05383-MGC (S.D.N.Y. filed June 12, 2008), although plaintiffs voluntarily dismissed that case without prejudice. Lagardère holds a 7.5% stake in EADS.

Thales SA is a leading European corporation that supplies civil and military technologies to companies in the aerospace, space, defense, security and transportation industries. Thales is organized under French law, and is headquartered and registered in France. Thales common stock is listed on the Paris exchange, and is not listed on any U.S. exchange. The Republic of France holds approximately 27 percent of Thales' shares.

Technip SA is a world leader in engineering, technological support, and project management for the oil

and gas industries. Technip is organized under French law and headquartered in Paris. Its common stock is traded on the Paris exchange, and is not listed on any U.S. exchange. ADRs in Technip stock are traded over the counter in the United States through a sponsored ADR program.

Vivendi SA is a French company engaged primarily in the communications and entertainment industries. Vivendi is headquartered in Paris, and shares of Vivendi common stock are traded on the Paris exchange. Vivendi common stock is not listed on any U.S. exchange. ADRs in Vivendi stock are traded over the counter in the United States through a sponsored ADR program. Vivendi is currently defending a securities class action brought on behalf of shareholders in the United States, France, England and the Netherlands. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2009 WL 855799 (S.D.N.Y. Mar. 31, 2009) (denying motion to reconsider certification of class including French shareholders). On January 29, 2010, a jury in that case found that Vivendi had violated Section 10(b) by issuing false or misleading public statements with reckless disregard for their truth. Although no judgment has yet been entered, plaintiffs' counsel have asserted publicly that class members could recover in excess of $9 billion. *See Court Finds Vivendi Liable for Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3.

As indicated above, some *amici* are currently subject to class action lawsuits in the United States that raise issues similar to those presented here, and this Court's decision will likely have a substantial impact on those lawsuits. Other *amici* face the risk of

similar lawsuits in the United States in the future. *Amici* thus have a substantial interest in the outcome of this appeal.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that the anti-fraud provisions of the Exchange Act do not reach the conduct at issue in this case. The Exchange Act does not apply to the adequacy of disclosures made by foreign companies, in foreign countries, pursuant to foreign regulation, which allegedly affect the value of stock purchased on foreign exchanges. This conduct is subject to extensive regulation in foreign countries, including the EU and the individual EU member states where *amici* are based and where their securities trade. European securities regulation is different from, and in some respects inconsistent with, the U.S. regulatory and enforcement regime. To the extent that U.S. courts apply U.S. anti-fraud laws to foreign transactions, they effectively superimpose U.S. law on foreign regulatory regimes and override important policy choices made by foreign governments.

The fundamental question presented in this case is whether Congress intended the Exchange Act to apply to such extraterritorial conduct. Whether this issue is viewed as one of subject matter jurisdiction, as the Second Circuit did, or is more properly analyzed as whether Petitioners have stated a cause of action under the Exchange Act, as the Solicitor General suggests, the result is the same. Under either approach, the Second Circuit correctly held that the Exchange Act does not apply to such extraterritorial conduct, and the decision below should therefore be affirmed.

In determining whether Congress intended to apply U.S. law to foreign conduct, the Court has relied on two canons of statutory interpretation: (1) the presumption against extraterritorial application of U.S. laws; and (2) principles of comity that bear on the reasonableness of applying U.S. law to conduct abroad. Here, both principles compel the conclusion that the Exchange Act does not apply.

First, the Exchange Act does not provide any "clear expression" of Congressional intent to apply the Act to extraterritorial conduct, as would be required to overcome the presumption against extraterritoriality. On the contrary, the statute, correctly read, states on its face that it applies only to "purchases and sales" of securities on a "national exchange" in the United States, or to purchases and sales of unregistered securities in the United States.

Second, principles of comity require that the Act should not be construed to apply here. *Amici*, as multinational corporate issuers based in the EU, are subject to extensive securities regulation both by the EU itself and by EU member states. Superimposing U.S. anti-fraud regulation – via U.S.-based class action litigation – on these carefully considered and sophisticated European regulatory regimes would effectively override important policy decisions that the EU and its member states have sought to implement. Moreover, U.S. anti-fraud enforcement procedures – particularly in class action litigation – conflict sharply with practices in the EU member states. Specifically, (1) European countries typically allow only limited discovery, and many have "blocking statutes" to protect their citizens against broad U.S. discovery; (2) European countries typically do not

allow plaintiffs' lawyers to recover contingent fees, and many apply a "loser pays" rule; (3) some European countries require individual proof of reliance and reject the fraud-on-the-market theory; and (4) some European countries consider the U.S.'s "opt-out" class action procedure inconsistent with basic concepts of due process, with the result that European multinationals which have settled or won class actions in the U.S. remain exposed to further litigation by European plaintiffs who may not be bound by the U.S. judgment.

All of these differences would result in friction between the U.S. and the EU and its member states, and would undermine the interests protected by comity, if the Exchange Act were interpreted to apply to extraterritorial conduct. Accordingly, the Court should clarify that Section 10(b) does not apply to purchases or sales of foreign securities on foreign exchanges.

ARGUMENT

The question in this case is whether plaintiffs suing in U.S. courts can assert federal securities fraud claims against foreign companies based on allegedly fraudulent disclosures made in foreign countries that have allegedly affected the value of securities purchased abroad. *Amici* assert that they cannot.

The Court of Appeals reached the same conclusion, dismissing plaintiffs' claim for lack of subject matter jurisdiction. In so doing, the Court of Appeals followed an extensive line of cases in which the federal courts have dismissed securities fraud claims bearing little or no connection to the United States on the grounds that they lacked subject matter jurisdiction.

See, e.g., *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313-17 (11th Cir. 2009); *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987); *Grunenthal, GmbH v. Holtz*, 712 F.2d 421, 424-26 (9th Cir. 1983); *Cont'l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

The Solicitor General, in her brief opposing certiorari, argued that it is more appropriate to analyze this issue in terms of whether plaintiffs have pleaded a cause of action under Section 10(b), citing the Court's recent decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006). Brief for the United States as *Amicus Curiae* at 8-9. *See also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting).

Amici submit that the result in this case should be the same, regardless of which of these approaches the Court adopts. In either case, the issue is one of statutory interpretation: whether Congress intended the Exchange Act to apply to foreign trading. In resolving such issues, the Court has typically applied two canons of statutory construction: (1) the presumption against extraterritorial application of U.S. law, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"); and (2) the rule that ambiguous statutes must be interpreted to avoid unreasonable interference with the sovereign authority of other nations. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The latter rule derives from principles of "prescriptive comity" – *i.e.*, "the respect sovereign nations afford

each other by limiting the reach of their laws." *Id.* at 164, 165; *Hartford Fire Ins.*, 509 U.S. at 817 (Scalia, J., dissenting).

Application of these canons of construction here requires affirmance of the Second Circuit's decision.

I. Congress Has Not Expressed Any "Clear Intent" To Permit Extraterritorial Application Of Section 10(b).

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The Court must "assume that Congress legislates against the backdrop of [this] presumption," and that statutes apply only domestically unless a different "affirmative intention of the Congress [is] clearly expressed." *Aramco*, 499 U.S. at 248. Thus, unless a statute provides a clear expression of Congressional intent to apply its terms extraterritorially, courts must construe it to have only domestic effect. *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455 (2007). This "presumption that United States law governs domestically but does not rule the world," *id.* at 454, is based on the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

In considering this presumption, courts have stated that the Exchange Act is silent regarding its extraterritorial application, *see, e.g.*, *Zoelsch*, 824 F.2d at 30, 33; *Cont'l Grain*, 592 F.2d at 416; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.

1975), based on the understanding that Congress, in 1934, could not foresee the development of global securities markets. *See, e.g., Bersch*, 519 F.2d at 993. In fact, however, the legislative history of the Exchange Act shows that Congress was well aware of international securities markets and that there had been substantial international securities investment during the 1920's. *See* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 691-94 (1990).

Petitioners argue that the text of Section 10(b) supports extraterritorial application (Pet. Br. 22-23), but a more careful reading compels the opposite conclusion. Petitioners ignore Section 10(b)'s requirement that the fraud must have been employed in connection with the purchase or sale of either (1) a security "registered on a national securities exchange" or (2) "any security not so registered." 15 U.S.C. § 78j(b).[3] Consistent with use of the term "national securities exchange" in other sections of the Act, the first clause clearly refers to transactions in securities registered on a *United States* exchange.[4] While the second clause was plainly intended to expand the scope of the statute to reach securities not registered on an organized exchange, there is no

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[3] Petitioners misquote the statute, and do not address the "purchase or sale" requirement at all. Pet. Br. 13. Section 10(b) was amended in 2000 to extend its applicability to include the purchase or sale of certain swap transactions, but that aspect of the purchase or sale requirement is not relevant here.

[4] *See, e.g.*, Section 6 of the Exchange Act, 15 U.S.C. § 78f, which establishes the requirements for an exchange to be registered as a "national securities exchange."

reason to believe that it was intended to expand the *geographic* scope of Section 10(b) to encompass the purchase or sale of any security anywhere in the world, including securities registered on foreign exchanges.[5] The more natural reading is that the second clause refers to transactions in unregistered securities *in the United States*. *See generally Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) ("[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words").

But even if the Court finds this analysis inconclusive, there is plainly no "clear expression" of congressional intent that the provisions of the Exchange Act apply to foreign transactions. Petitioners (Pet. Br. 23) and some of their *amici* (*see, e.g.*, Brief for *Amici Curiae* Alecta Pensionsförsäking et al. ("Alecta Br."), at 8-9) make much of the fact that the Exchange Act – like a great many acts of Congress – defines "interstate commerce" to include commerce "between any foreign country and any State." 15 U.S.C. § 78c(a)(17). But this is precisely the sort of "boilerplate" jurisdictional language that the Court in *Aramco* held insufficient to demonstrate any clear congressional intent that the Act apply extraterritorially. 499 U.S. at 250-53. Thus, the presumption against extraterritorial application of U.S. laws

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[5] As Judge Friendly pointed out in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336 & n.5 (2d Cir. 1972), the second clause was added in Conference Committee, without explanation.

applies, and precludes application of Section 10(b) and Rule 10b-5 here.[6]

Finally, even if there were some basis for concluding that Congress intended to permit the Securities and Exchange Commission ("SEC") to enforce Section 10(b) against foreign defendants in these circumstances, there is still no basis for concluding that Congress intended Section 10(b) to authorize damages claims by private litigants. As the Court recently noted, private rights of action pursuant to Rule 10b-5 are entirely "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). Section 10(b) is thus silent with respect to damages actions under Rule 10b-5, and there is no basis for overcoming the presumption against extraterritoriality in the context of damages actions based on foreign trading.[7]

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[6] The Alecta *amici* argue that "Congress could have, but chose not to, apply territorial limitations to Section 10(b)." Alecta Br. 10. This argument stands the presumption against extraterritorial application on its head. Congress is not required to carve out parts of statutes it wants to limit to domestic conduct; rather, it must "clearly express" when it wants a statute to apply extraterritorially.

[7] In addition, the comity issues discussed below are a lesser concern where government enforcement is involved. As the Court explained in *Empagran*, "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." 542 U.S. at 171.

II. Applying Rule 10b-5 To Foreign Companies Based On Foreign Trading Would Unreasonably Interfere With The Securities Regulation Of Foreign Nations.

"[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. This canon of construction is based on the longstanding rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); it "is relevant to determining the substantive reach of a statute because 'the law of nations' . . . includes limitations on a nation's exercise of its jurisdiction to prescribe." *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting). Thus, courts should read generally-worded statutes in light of "principles of customary international law," which the courts "assume Congress ordinarily seeks to follow." *Empagran*, 542 U.S. at 164; *see also Microsoft*, 550 U.S. at 455 ("courts should 'assume that legislators take account of the legitimate sovereign interests of other nations' ") (quoting *Empagran*, 542 U.S. at 164). By precluding application of U.S. regulation to foreign conduct, these principles ensure that other sovereign nations are left to "independently . . . regulate [their] own commercial affairs," *Empagran*, 542 U.S. at 165, and that "the potentially conflicting laws of different nations [can] work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

The concerns underlying this canon of interpretation are especially pressing in the context of extraterritorial securities regulation. The regulation of securities markets within a sovereign state inevitably involves complex policy judgments unique to the enacting state. Each nation must decide for itself how to curb fraud, how to balance investor protections against countervailing policies that promote growth and discourage unreasonable litigation costs, and how to allocate responsibility for enforcement between government agencies and private damages actions. Each nation's decisions on these fundamental issues reflect policy choices that are entitled to deference by other nations. *See Microsoft*, 550 U.S. at 455 (noting importance of comity in patent area, because "foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public") (quotation marks & citation omitted).

Petitioners argue that there is no need for concern about potential conflicts with foreign securities laws, because "anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged." Pet. Br. 35-36. Although there is some support for this proposition in older lower court decisions, *see, e.g.*, *IIT v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980), and in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 (1987), the Court in *Empagran* squarely rejected a similar argument: as the Court explained, "even where nations agree about primary conduct . . .

they disagree dramatically about appropriate remedies." 542 U.S. at 167.[8]

In some respects, European liability rules are more favorable to plaintiffs than U.S. law: for example, the EU and some member states enable plaintiffs to recover for certain securities law violations without proof of fraudulent intent,[9] whereas Rule 10b-5 plaintiffs must show intentional or reckless wrongdoing. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). But to the extent that the U.S. provides a more attractive forum for plaintiffs claiming securities law violations (*see* pp. 22-29, *infra*), application of U.S. securities laws where plaintiffs purchased shares in foreign companies on foreign exchanges "would unjustifiably permit [foreign] citizens to

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[8] Plaintiffs in *Empagran* argued that "many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal." 542 U.S. at 167. The Court, however, pointed out that even where nations agree on the undesirability of price-fixing, the availability of treble damages under U.S. law created incentives that would encourage foreigners to forum shop, discourage cooperation by foreign defendants in foreign enforcement actions, and otherwise undermine foreign law enforcement regimes. *Id.* The same is true here: as discussed below, the availability of private securities class actions and substantial contingent fees for plaintiffs' lawyers create powerful incentives for forum shopping in the United States at the expense of foreign proceedings.

[9] *See, e.g.*, French Civil Code Art. 1383 (imposing liability for negligence); *Spector Photo Group NV v. CBFA* (European Court of Justice, Dec. 23, 2009), ¶¶ 37-38, 62, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-45/08 (intent is presumed where an individual knowingly in possession of inside information purchases or sells a security, unless it is shown that the inside information did not influence his actions).

bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic [ ] laws embody." *Empagran*, 542 U.S. at 167. In either case, the civil liability regimes in the U.S. and in the EU are significantly different, and the assertion of U.S. jurisdiction in such cases – thereby superimposing American anti-fraud rules on the independent regulatory regimes of foreign nations – would cause unnecessary friction between the U.S. and the EU. The Court in *Empagran* made clear that principles of prescriptive comity do not permit such acts of "legal imperialism." *Id.* at 169.

As we show below, these concerns are by no means imaginary. Permitting Rule 10b-5 class actions based on trading in shares in foreign companies on foreign exchanges would interfere with foreign securities regulation in a variety of important ways. With respect to the countries of the European Union, that interference would take place both at the EU level – where the EU has sought, through a variety of directives, to establish an integrated European capital market – and at the level of the individual member states, which must implement EU directives in a manner consistent with their own distinct practices, procedures and remedies.

A. EU Securities Regulation.

Beginning in 2003, the EU adopted a series of directives which have had an important impact on securities regulation in the EU. They include, *inter alia*, (1) the "Prospectus Directive,"[10] which created a

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[10] Directive 2003/71/EC of the European Parliament and of the Council (Nov. 4, 2003).

unified process for public offerings; (2) the "Transparency Directive,"[11] which establishes minimum reporting obligations for companies with securities trading on regulated markets; and (3) the "Market Abuse Directive,"[12] which prohibits market manipulation and insider trading and regulates the disclosure of material information by issuers. Each of these directives regulates conduct that is frequently the subject of Rule 10b-5 litigation in the U.S.

The important policy objective underlying these directives was to create a single integrated capital market in the EU, in response to increasing international competition between financial markets.[13] While seeking to create a unified market, however, the EU left room for member states to pursue their own unique policies with respect to securities regulation in particular areas. For example, the Prospectus Directive, while harmonizing prospectus content requirements, generally leaves it to individual member states to establish enforcement mechanisms and standards of civil liability.[14]

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[11] Directive 2004/109/EC of the European Parliament and of the Council (Dec. 15, 2004).

[12] Directive 2003/6/EC of the European Parliament and of the Council (Jan. 28, 2003).

[13] EC, *Financial Services: Implementing the Framework for Financial Markets: Action Plan* (COM 1999); Speech of Baron Alexandre Lamfalussy (Feb. 15, 2001), *available at* http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm.

[14] *See* Dorothee Fischer-Appelt & Jeffrey B. Golden, *The EU Prospectus and Transparency Directives – Towards A Unified European Capital Markets Regime*, *in* PLI's FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE, at 31 (Practising Law Institute, 2004).

Similarly, under the Transparency Directive, individual EU member states can impose more stringent reporting requirements on issuers beyond the minimum required by the Directive. *See* Edward F. Greene et al., U.S REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS, § 7.03[4] (Aspen 2008). To the extent an EU member adopts such "super-equivalent" requirements, it will be a jurisdiction that is less desirable for issuers, but more desirable for investors. The choice between those alternatives, of course, is an important policy choice for each member. And, for issuers deciding which jurisdiction to select as a "home member state" (*i.e.*, the state principally responsible for regulation of the issuer), two important criteria are the civil liability regime a state has adopted and the existence of super-equivalent reporting requirements. *See id.*

If plaintiffs were permitted to sue foreign issuers under Rule 10b-5 based on foreign transactions, the exercise of U.S. jurisdiction would undermine the EU's comprehensive securities regulation regime and erode important differences between U.S. and EU disclosure requirements.[15] It would render the EU's

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[15] For example, European directives sometimes permit issuers to defer public disclosure of facts to protect a "legitimate interest" of the issuer – for example, where public disclosure might affect the outcome of pending negotiations, particularly "where the issuer's financial viability is in grave and imminent danger." *Autorité des Marchés Financiers* General Regulation, Art. 223-2. In the United States, disclosure may not be deferred; rather, material events that arise between regular periodic disclosures must be disclosed promptly pursuant to SEC Regulation 8-K. *See* 17 C.F.R. §§ 240.0 *et seq.* As another example, the Prospectus Directive imposes only limited controls on publicity surrounding public offerings. *See* Fischer-Appelt &

delegation of standards of civil liability to its member states superfluous, and eradicate carefully considered differences between EU members with respect to the civil remedies they provide and the disclosure requirements they have adopted. In their place, it would impose an overarching U.S.-based system of civil liability for securities fraud implicitly incorporating reporting and disclosure obligations established under U.S. law.

B. EU Member State Securities Regulation.

U.S. procedures, remedies and standards of civil liability in securities litigation are different from – and in many cases inconsistent with, or even offensive to – the procedures, remedies and standards that EU member states have adopted.

As prescribed by the EU, each member state has its own securities regulators that police securities fraud and insider trading, and investigate and prosecute violations. In France, for example, securities regulation is entrusted to the *Autorité des Marchés Financiers* ("AMF") (*i.e.*, the "Financial Markets Authority") – the French equivalent of the SEC – which is responsible for safeguarding investments, ensuring that issuers disclose material information, and supervising financial markets. The AMF has established rules for transactions in securities of publicly-traded companies, and monitors disclosures by issuers to ensure they provide adequate information

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Golden, *supra* note 14, at 23-24. By contrast, U.S. securities regulation emphasizes the manner of sale (*i.e.*, via prospectuses filed with the SEC), and prohibits conditioning of the market through research reports and other means. *Id.*

to market participants. The AMF also has enforcement powers that enable it, *inter alia,* to investigate suspected securities fraud and impose sanctions for violations of its regulations.[16]

As in many other European countries, such government enforcement actions provide France's primary vehicle for remedying securities law violations. French shareholders have the right to bring private securities actions in French civil courts. In addition, as "parties civiles," shareholders may initiate or join in criminal prosecutions involving securities law violations, and the final judgment, if the case proceeds to trial, will include a determination of both criminal and civil liability.[17] But there is no mecha-

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[16] The AMF recently concluded an extensive, three-year investigation into EADS' disclosures regarding the production delays affecting Airbus' A380 aircraft, which are the subject of the pending securities class action against EADS in the U.S. In December 2009, the AMF's Sanctions Committee determined that EADS' disclosures were not misleading and that the company had complied with all applicable market information duties. A criminal investigation in France relating to the same issues remains pending. In Germany, the *Bundesanstalt fur Finanzdienstleistungsaufsicht* ("BaFin") – *i.e.*, the "Federal Financial Supervisory Authority" – opened an investigation in 2006 into EADS' disclosures about the A380, but discontinued the investigation the following year, without finding any misconduct. A related action has been filed in the Netherlands which, if allowed to proceed, would initiate an inquiry into whether EADS management acted appropriately in connection with the A380 disclosures, and could, through subsequent liability proceedings, result in civil liability to a class of EADS shareholders.

[17] Once an investigation is initiated, the "partie civile" has access to the investigative file and is permitted to make suggestions regarding the conduct of the investigation. If the investigation determines that the facts warrant, the matter is referred

nism in French law comparable to the U.S. "opt-out" class action through which private parties can litigate securities claims on an aggregate basis, and other French policy choices – with respect to discovery, the requirements for establishing reliance, and the payment of legal fees – make it more difficult for private plaintiffs to proceed independently, and create incentives for plaintiffs to allow public authorities, in the first instance, to establish a violation of the securities laws as a predicate for private claims. *See* Véronique Magnier, *Information Boursière et Préjudice des Investisseurs*, ¶ II.A (Recueil Dalloz 2008), at 558.[18]

Thus, transactions involving foreign securities on foreign exchanges are already extensively regulated by foreign regulatory regimes.[19] Any U.S. attempt to

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for trial, in which counsel for the partie civile is entitled to participate.

[18] *Amici* would be pleased to provide the Court, upon request, with English translations of any of the foreign language materials cited in this brief.

[19] Other European countries have their own securities enforcement regimes. In Germany, BaFin is a single, integrated regulator of Germany's banking, insurance, and securities markets. Swethaa Ballakrishnen et al., *An Overview of Securities Enforcement in Germany*, at 9 (May 11, 2008). BaFin is responsible for ensuring the stability and integrity of the German financial system, and has wide-ranging powers of investigation and intervention. *Id.* at 12. In the securities arena, BaFin regulates, among other things, information disclosure, insider trading, and market manipulation. *Id.* at 16-17. In the Netherlands, the primary securities regulator is the *Autoriteit Financiële Markten* ("Authority for the Financial Markets," or "AFM"). The AFM is an independent authority that regulates insider trading, market manipulation, issuer disclosures and reporting, and offerings. The AFM can impose

extend application of the Exchange Act to such transactions would unreasonably interfere with the sovereign authority of these foreign nations.[20]

C. Specific Areas Of Conflict Between U.S. Securities Litigation And EU Policies.

We discuss below several specific areas where U.S. securities litigation can and has interfered with European practices and policies.

1. U.S. Discovery Practices Offend The Policies Of France And Other EU Member States.

Subjecting foreign defendants to the burdensome discovery common to American securities litigation – particularly when the discovery relates to conduct that has little or no connection to the United States – would undermine the policy choices made by foreign governments and exacerbate frictions created by broad U.S. discovery demands.

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fines and penalties, and may refer violations for public prosecution.

[20] European nations have bristled at the idea that investors purchasing stocks on foreign exchanges will not be adequately protected from corporate fraud unless U.S. courts extend jurisdiction over their claims. *See* John D. Kelly, *Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL'Y INT'L BUS. 477, 495 (1997). There is no reason to believe that France, Germany, the Netherlands, or other members of the EU are unable to effectively regulate securities markets within their jurisdictions, or that they want U.S. assistance in prosecuting fraudulent activity. *Id.*

The French legal system, like other civil law systems, has a markedly different approach to litigation and discovery than the United States. American discovery is extremely broad and tends to be controlled primarily by the parties in pre-trial proceedings. In France, discovery is much narrower and some aspects, particularly the taking of oral testimony, are controlled by the court. The parties in France are generally required to produce only documents that are explicitly or implicitly referred to in their briefs. Further discovery is restricted: the court may, upon request, order the production of additional documents, but only if they are identified with the precision required to verify that they are relevant to the case. Broad requests for "all documents referring or relating to" a general subject matter – while typical in the U.S. – would not be permitted in France absent a specific showing of the relevance of all such documents. Moreover, "relevance" in French terms means evidence that will in fact be admissible at trial,[21] whereas U.S. rules expressly permit discovery of information that need not be "admissible at trial" if it is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Oral testimony is rarely permitted in French civil litigation, but when it is permitted, the judge personally conducts the taking of testimony and determines what questions will be asked.

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[21] *See* French Code of Civil Procedure, Arts. 9-11, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r=7079; *id.* Book I, Title VII, Sub-Title I, Chapters I-III, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r=7115. *See generally* S. Guinchard, *Droit et Pratique de la Procédure Civile*, at 803-06 (2009/2010).

Imposing U.S. discovery rules on foreign defendants when the action relates to conduct that has little or no connection to the United States would undermine the sovereignty of foreign nations by eliminating the role of their judiciaries in the discovery process and subjecting foreign companies to requirements inconsistent with the policy choices made by their own governments.[22] At least fifteen foreign countries – including France, the Netherlands, Germany, Great Britain, Italy, and Belgium – have enacted blocking legislation in an effort to ensure that their sovereign policy choices regarding the conduct of civil litigation are not overridden by U.S. courts. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 442, reporters' notes 1, 4; *see also Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 526 & n.6 (1987) (discussing French statute).[23] Such blocking statutes do "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute." *Aérospatiale*, 482 U.S. at 544 n.29. But the existence of a blocking statute is

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[22] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 442, reporters' note 1 ("The common theme of foreign responses to United States requests for discovery is that, whatever pretrial or investigative techniques the United States adopts for itself, they may be applied to persons or documents located in another state only with permission of that state.").

[23] *See also In re Avocat "Christopher X,"* Cass. Crim. (Dec. 12, 2007, Pourvoi no. 07-83.228, Bulletin Criminel 2007, no. 309) (a recent decision of the French *Cour de Cassation* – the French Supreme Court – upholding a fine imposed on a French lawyer who tried to obtain information from a witness in France, in violation of the blocking statute, in connection with litigation in California).

nevertheless relevant to a court's comity analysis, in that "its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material." *Id.* Accordingly, the federal courts, in the interest of comity, are required to give "due respect" to "any sovereign interest expressed by a foreign state" when responding to foreign litigants' objections to U.S. discovery demands. *Id.* at 546.

Thus, the friction between broad U.S. discovery requirements and important policies underlying foreign judicial systems, particularly in the EU, is very real. This friction is not unique to securities litigation, but it would be exacerbated if plaintiffs who purchased shares in foreign companies in foreign markets were permitted to bring securities claims in the United States. To the extent that foreign companies are unreasonably compelled to participate in litigation in the United States, "expensive, time-consuming battles about discovery [will] proliferate . . . [and] can promote disharmony among national and international authorities." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268-69 (2004) (Breyer, J., dissenting).

2. U.S. Fee Arrangements Conflict With The Policies Of Many European Countries.

U.S. rules regarding responsibility for attorneys' fees differ significantly from the policies prevalent in Europe. In the United States, each party bears its own legal costs, unless a statute specifically provides for cost-shifting. By contrast, France, Germany, the Netherlands, and other members of the EU generally require the losing party to pay the legal fees of both

litigants.[24] In addition, contingency fee arrangements, which are routine in U.S. securities litigation, are prohibited or severely limited in most countries in Europe. *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 198 (2009).[25] These rules reflect the policies of the EU member states, which typically rely upon government enforcement of securities laws. Europeans recognize that their fee rules may reduce the incentives for plaintiffs to bring civil securities litigation, but consider that outcome preferable to giving plaintiffs' lawyers incentives to bring speculative claims in hopes of obtaining windfall settlements and fees. *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. TRANSNAT'L L. & POL'Y 281, 287-88 (2006).[26] More-

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[24] *See* French Code of Civil Procedure, Arts. 696, 700 (requiring losing party to pay legal fees in amount set by the court and subject to court's discretion); Dutch Code of Civil Procedure Arts. 237, 241, and Dutch Civil Code Book 6 Art. 96(2) (legal fees in standardized amounts awarded to winning party, subject to court's discretion); German Code of Civil Procedure § 91 *et seq.* (losing party pays legal fees set by court subject to statutory rules on lawyer remuneration).

[25] German and Dutch law generally prohibit contingent fee arrangements. *See* Ballakrishnen et al., *supra* note 19, at 56 n.124; Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. TRANSNAT'L L. & POL'Y 281, 287 (2006). France allows only very limited forms of contingent fees. *See id.*; Magnier, *supra*, at n.37.

[26] For example, although Germany has a process for litigating securities claims through "model proceedings," making litigation of common issues more efficient, German law *prohibits* attorneys acting on behalf of model plaintiffs from being compensated for work done for anyone other than their own

over, European countries believe that their fee rules avoid conflicts of interest between plaintiffs and their attorneys – for example, the conflicts that could arise if attorneys compensated on a contingency basis press to settle claims for less than is in the client's interest (or decline settlements that might be in the client's interest) to ensure a recovery that will cover their investment in the litigation. *Id.* at 288. Permitting plaintiffs who are discouraged from litigating in Europe by European fee structures to take advantage of U.S. courts where contingency arrangements are permitted clearly undermines these significant European policy choices.

More broadly, the availability of contingent fees in the United States constitutes a powerful incentive for lawyers to bring securities cases – and especially class actions – in the United States, regardless of where the underlying conduct occurred or where the securities were traded. If plaintiffs were permitted to bring securities lawsuits in the United States against foreign issuers based on foreign trading, this strong incentive to shop for a U.S. forum, regardless of its appropriateness, would exacerbate the tensions between U.S. and foreign securities regulation.

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client. This rule was established to avoid creating a financial incentive for attorneys to bring cases likely to develop into model proceedings. Dietmar Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation (Germany)* 27 (2007), *available at* http://www.law.stanford.edu/library/globalclassaction/PDF/Germany_National_Report.pdf.

3. The U.S. Fraud-On-The-Market Theory Is Inconsistent With European Rules Requiring Proof Of Individual Reliance, And Creates A Substantial Inducement For International Forum Shopping.

In the United States, plaintiffs in securities fraud cases need not prove individualized reliance on the alleged misstatements or omissions at issue. Instead, courts may presume, under the fraud-on-the-market theory, that plaintiffs relied on the integrity of the stock price when they purchased their shares. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988).

By contrast, private plaintiffs seeking damages for securities law violations in Europe are generally not entitled to any such presumption and must establish individualized reliance. *See, e.g., Société Eurodirect Marketing v. Pfeiffer*, no. 03-20600 (Cass. Com. Nov. 22, 2005) (French law requires each individual plaintiff to prove reliance); Judgment of the Bundesgerichtshof (the German Federal Supreme Court), dated 28 November 2005 – II ZR 80/04 (rejecting fraud-on-the-market theory as developed in *Basic Inc. v. Levinson*); *Warlop v. Lernout*, 473 F. Supp. 2d 260, 264 (D. Mass. 2007) (stating that Belgian law does not recognize fraud-on-the-market theory).

If Section 10(b) were interpreted to apply to foreign trading in the shares of foreign issuers, the availability of the fraud-on-the-market presumption in the United States would enable many plaintiffs who would be unable to establish a claim for damages in Europe to recover on the same claim in the U.S. courts. This would undermine the policies underlying European rules requiring proof of reliance, and

create a powerful incentive for international forum shopping.

Petitioners' *amici* glory in this result, arguing that in a "globally efficient market, 'reliance' does not exist in any single country, but is instead a result of information that is generally available worldwide." Alecta Br. 25. In effect, Petitioners' *amici* urge the Court to recognize a fraud-on-the-market theory that would apply on a global basis, overriding all jurisdictional boundaries and establishing the federal district courts as a sort of "world court" of plaintiffs' securities litigation. This argument, if accepted, would permit U.S. damages actions based on alleged misrepresentations made anywhere in the world, brought by plaintiffs of any and all nationalities, regardless of any limitations that their local law might seek to impose. There is no reason to believe that Congress in enacting Section 10(b) intended any such result. *Cf. Empagran*, 542 U.S. at 166-67 (rejecting similarly broad claim under the antitrust laws).[27]

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[27] The dangers posed by indiscriminate imposition of the fraud-on-the-market theory to transactions beyond U.S. territorial boundaries – and the real risk of conflict with the policies and sovereignty of foreign nations – is illustrated by the recent jury verdict in the *Vivendi* case. In *Vivendi*, 37% of the company's ordinary shares were held by French shareholders who had purchased their shares on the Paris stock exchange; only 25% were held by U.S. investors, with the rest held mostly by other Europeans. *See In re Vivendi Universal, SA Sec. Litig.*, 242 F.R.D. 76, 81 (S.D.N.Y. 2007). But the district court certified a class that included French, British and Dutch, as well as American, shareholders, and a jury recently found Vivendi liable under Section 10(b). Plaintiffs' counsel have asserted publicly that class members could recover in excess of $9 billion, following completion of a claims process. *See* p. 4, *supra*. If upheld on appeal, the result would be imposition of a

4. These Comity Concerns Are Exacerbated By U.S. Class Action Procedures.

Securities class actions raise additional conflicts with the policies of France and other European nations, particularly with respect to the question whether absent class members will be bound by U.S. judgments.

French constitutional principles place great emphasis on individual notice, consent, and party autonomy in its legal system. These values are reflected in rulings of the Constitutional Council, the highest constitutional authority in France, holding that the French Constitution requires individual class members be provided with actual personal notice of class proceedings, and that each individual retains the rights to determine how his interests will be represented and to terminate his involvement at any point prior to judgment. *See Alstom*, 253 F.R.D. at 286 (citing Decision 89-257 of July 25, 1989, at 9503). The Constitutional Council recently reaffirmed the importance of this aspect of "personal freedom" in French public policy. As the Council explained, "[i]n the absence of the observance of this individualized consent [to sue], which does not exist, for example, in the Anglo-Saxon mechanisms of 'opt-out' class actions, the individual would, abusively, be deprived of a right in violation of the Constitution." Commentary on Decision No. 2007-556 DC, pub-

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staggering judgment on an important French company, purportedly for the benefit principally of French and other European shareholders, based on a theory of liability that is flatly inconsistent with the policy choices made by France, where Vivendi and most of its shareholders are located.

lished in *Les Cahiers du Conseil Constitutionnel*, No. 23, Aug. 6, 2007.

In light of these constitutional principles, several reports recently issued by French government commissions have emphasized that opt-out class actions violate French public policy. *See* Report of the *Commision pour la Libération de la Croissance Française* ("Commission to Promote Growth in France" or "Attali Commission," appointed by President Nicolas Sarkozy), Decision No. 191, at 144 (Jan. 2008) (concluding that any class action procedure in France could only bind plaintiffs who opt in); Report of the Coulon Commission to the French Minister of Justice, at 96 (Jan. 2008) (stating that "the opt-out model . . . is constitutionally uncertain" in France, and recommending that any class action procedure in France be based on an opt-in model); *Alstom*, 253 F.R.D. at 286 (discussing report of 2005 working group established by former French President Jacques Chirac, which concluded that the Constitutional Council's ruling prohibited the opt-out class action procedure).[28]

Other European countries have adopted similar policies to ensure that individuals should not be bound by litigation in which they are not direct participants. For example, Germany's Capital Investors' Model Proceeding Law established a judicial process for securities fraud claims in which common issues affecting multiple individual suits

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[28] *See also Alstom*, 253 F.R.D. at 286-87 (discussing 2007 letter prepared by French Ministry of Justice, which advised court that "[t]he opt out mechanism ... does not comply with the constitutional rules established" by the Constitutional Council); *Vivendi*, 2009 WL 855799, at *4 (same).

can be litigated together and applied uniformly to the pending cases.[29] However, the judicial determinations made in a model proceeding only apply to pending cases brought by individual litigants, and have no effect on unasserted claims. *See* Mark C. Hilgard & Jan Kraayvanger, *Class Actions and Mass Actions in Germany*, Litigation Committee Newsletter (IBA Legal Practice Division), Sept. 2007, at 40.

These policies create a very real risk that the courts in France and other European countries would not enforce or grant preclusive effect to U.S. class action judgments in securities cases. Most European countries – including France – reserve the right to refuse to enforce judgments that violate local public policy. Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 33 (2007). Many foreign countries do not have procedures like the U.S. class action, and even those that do rarely permit courts to bind plaintiffs who have not affirmatively opted into the litigation. *Id.* Thus, when a judgment is entered against a foreign defendant in a "foreign-cubed" class action, there is a

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[29] Under the German law, any party in a pending securities case can petition the court to open a case in which common issues of fact and/or law are determined in one set of proceedings ("model case proceedings"), with binding effect on all plaintiffs who have filed similar actions. Such model case proceedings may proceed in the Higher Regional Court if at least ten such petitions are filed in similar cases. The Higher Regional Court decides the common legal issues, and its decision binds the courts where the individual cases are pending. *Id.*

significant risk that a foreign court – particularly in the EU – will refuse to enforce it.[30]

The potential refusal of foreign courts to enforce U.S. class action judgments has at least two negative effects. First, it can lead to costly litigation in the foreign state on the ancillary issue of whether the judgment should be enforced. Second, it could enable foreign class members to relitigate issues that have already been adjudicated in the U.S., providing plaintiffs with at least two "bites at the apple" should they not be satisfied with the outcome of the U.S. proceeding. Thus, defendants in U.S. class actions may be unable to benefit from obtaining a favorable judgment against foreign nationals; equally important, defendants are also unable to "buy peace" with a settlement, because the settlement will not prevent new litigation by foreign plaintiffs in jurisdictions where the resulting judgment of dismissal would not be given preclusive effect.

III. The Anti-Fraud Provisions Of The Exchange Act Do Not Reach Transactions In Foreign Securities Purchased On Foreign Exchanges.

Although plaintiffs propose that the Court adopt a test based on the "materiality" and "substantiality" of U.S. contacts (Pet. Br. 26, 31), there is no statu-

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[30] Indeed, U.S. judges have reached different conclusions on the question whether a U.S. judgment in an opt-out securities class action against a French issuer would be recognized in France. *Compare Vivendi*, 242 F.R.D. at 95-103 (concluding that an American judgment would "more likely than not" be recognized in France), *with Alstom*, 253 F.R.D. at 282-87 (holding that a judgment in a U.S. opt-out class action would probably not be recognized by French courts).

tory basis for such a test. The type of fact-intensive analysis that such a test implies would also result in *ad hoc*, unpredictable determinations of whether the Exchange Act applies in particular cases, and could require extensive litigation, making it difficult for a district court to promptly dismiss cases that are not covered by the Exchange Act and improperly subjecting foreign issuers to extensive litigation before that issue can be determined. Moreover, as Justice Blackmun noted in *Aérospatiale*, "courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own," and have "little competence in determining precisely when foreign nations will be offended by particular acts." 482 U.S. at 552-53 (separate opinion). A test based on such subjective factors would impose extensive costs on defendants whose conduct is not within the reach of the Exchange Act, and cause precisely the kind of interference with the policies of foreign nations that the comity doctrine is intended to prevent. *See Empagran*, 542 U.S. at 168-69 (rejecting argument that courts could address comity concerns on a case-by-case basis because a case-by-case approach would be "too complex to prove workable").[31]

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[31] Petitioners argue that the Court need not concern itself with comity issues, since the district courts can always dismiss predominantly foreign cases pursuant to the doctrine of *forum non conveniens*. Pet. Br. 41-42. However, this argument simply evades the question at hand – *i.e.*, whether Congress intended to provide a cause of action under the Exchange Act in such cases. The fact that *forum non conveniens* also permits dismissal in proper cases (a determination which involves many considerations other than comity) does not mean that the demands of comity can be ignored in interpreting the scope of the Exchange Act. And, as discussed above, leaving the issue for resolution on *forum non conveniens* grounds would improperly subject foreign defendants who are not subject to the

Instead, the Court should interpret the Exchange Act to establish a bright-line rule that Section 10(b) does not apply to purchases of foreign securities on foreign exchanges. *See* Kelly, *supra* note 20, at 478; Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 465 (2009); *accord* Buxbaum, *supra*, at 68 (anti-fraud provisions should be limited to claims arising out of transactions on U.S. markets). As discussed above, this simple rule is supported by the text of the Exchange Act. It also makes sense for other reasons. From a comity perspective, it would require U.S. courts to defer to other countries which have a greater interest in regulating the conduct, *i.e.*, the countries in which the issuer is located and the securities transactions occurred. And it would "provide[ ] an easily understandable and, importantly, intuitively appealing rule for investors" that "is likely to comport with most investors' a priori views on when the U.S. laws apply." Choi & Silberman, *supra*, at 500.

Exchange Act to extensive and burdensome litigation in the United States before that issue could be determined.

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the Court should affirm the decision below.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, *et al.*,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-APPELLEES

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QUESTION PRESENTED

Whether, under the principles of international law and comity previously determined by this Court, a class of foreign investors is permitted to maintain claims for recovery of damages under a judicially-created implied right of action based on § 10(b) of the Securities Exchange Act of 1934, when the challenged disclosures were made by the foreign issuer in the foreign market where (i) most of the class members resided and (ii) the foreign government applied detailed disclosure rules to issuers and their agents.

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BRIEF OF THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-APPELLEES

INTEREST OF THE *AMICUS CURIAE* [1]

The Government of the Commonwealth of Australia ("the Australian Government") is committed to the rule of law as an essential element of international relations and of the global trading and investment system. It is opposed to overly broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes, because such litiga-

[1] No Counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* made any monetary contribution to its preparation or submission. This brief is filed with the written consent of all parties.

tion can interfere with national sovereignty and result in legal uncertainty and costs for actors involved in global trading and investment.

The Australian Government believes that those who commit securities fraud should be held accountable. Australia provides full access to an independent judiciary as the means for its nationals and others subject to its jurisdiction to pursue their legal rights and to recover compensation for securities law violations and other legal wrongs.

The Australian Government believes that the broad assertion of jurisdiction to provide civil remedies in national courts for violations allegedly perpetrated by foreign issuers of securities against foreign investors in foreign places is inconsistent with international law and may interfere with the regimes that Australia and other nations have established to regulate companies and protect investors in their markets. The Australian Government is concerned that an expansive exercise of jurisdiction by one nation can undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs.

This case provides the Court with an opportunity to address the use of § 10(b) of the Securities Exchange Act of 1934 and Securities Exchange Commission ("SEC") Rule 10b-5 for private actions seeking to impose liability on foreign companies for actions outside the United States that allegedly injured foreign plaintiff-investors, so as to minimize potential conflicts with other nations. As capital markets expand globally and more nations establish detailed regulatory systems (as Australia has done), the need to place appropriate limits on such "foreign-

cubed" actions in the U.S. courts has become more evident.

The issues here reflect a broader and recurring concern of the Australian Government and other governments about overly broad exercises of extra-territorial jurisdiction sometimes undertaken by U.S. courts.[2]

SUMMARY OF ARGUMENT

This is a case brought in New York against an Australian company by Australian investors who acquired securities in that company on an Australian securities exchange (and not any U.S. market) based on allegedly false and misleading statements made by that company in Australia. The allegations in the case fail to establish factually the minimum nexus that international law requires to exist between a state and the matter over which it seeks to exercise jurisdiction.

The statements by the National Australia Bank ("NAB") in Australia were made under a detailed securities regulatory regime prescribed by the Australian Parliament and enforced by the Australian Securities and Investments Commission ("ASIC").

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[2] See Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner in *Jose Francisco Sosa v. Humberto Alvarez-Machain,* No-03-339 (also including the representations of the Government of South Africa printed in the Appendix to this brief); and Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents in the present case No. 08-1191. The Government of Australia has also filed amicus curiae briefs in the U.S. Courts of Appeals in recent years on issues concerning the overly broad exercise of extraterritorial jurisdiction.

That regulatory regime includes a number of specific provisions authorizing private civil actions in federal and state courts for misleading disclosures and other infringements of the securities laws. Australia, unlike most countries outside of North America, has authorized opt-out class actions by statute and a significant number of class actions alleging infringements of the securities laws have been brought.

The present case is one of many in which foreign plaintiffs seek to bring essentially foreign disputes before U.S. courts in order to be able to utilize procedures and rules that tend to favor plaintiffs. Such a case gave rise to this Court's decision in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("*Empagran*"). This Court has repeatedly recognized the risk of jurisdictional conflicts among sovereign nations flowing from extraterritorial litigation brought in U.S. courts, and emphasized the importance of international comity as a way of minimizing such conflicts. It has also mandated that a U.S. statute will not be construed so as to violate international law, if any other construction is possible. If these considerations normally control when a court is construing a statute, they must also control when a court is construing a judicially-created right of action that has been implied from a statute.

Regardless of whether this case is resolved as a matter of "subject matter jurisdiction" or the "plaintiff's entitlement to relief" test employed by this Court in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and advocated by the Solicitor General in this case,[3]

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[3] Amicus Brief for the United States on Petition for Writ of Certiorari, *Robert Morrison, et al, v. Nat'l Australia Bank Ltd.*, No. 08-1191 (2009) ("*U.S. Brief*") at 8-9.

the result is the same: the alleged facts do not provide a sufficient basis to support a private suit under § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 because disclosure (or non-disclosure) of information occurred in a regulated foreign market where the foreign issuer's securities were bought by the foreign investor-plaintiffs.

This brief deals with private suits under § 10(b) and Rule 10b-5 and does not address issues relating to enforcement action by the SEC under those provisions.

ARGUMENT

I. AUSTRALIA'S COMPREHENSIVE SYSTEM OF SECURITIES MARKET REGULATION REFLECTS THE PUBLIC POLICY CHOICES MADE BY AUSTRALIAN GOVERNMENTS

A. Current System Founded On a Robust Legislative Regime Contained In the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001

Australian governments have long recognized that fair and efficient capital markets are important to the economy and to Australian companies and investors in particular. To this end, they have accorded a high priority to maintaining robust regulatory regimes.

In the early 1980's, cooperative arrangements were established by the federal government with the states and territories for the regulation of companies and securities. Under those arrangements, state and territory agencies acted as delegates of a national agency in administering uniform state and territory

laws which included information disclosure and investor protection rules. The arrangements were reconfigured in the early 1990's so that a single federal agency, the Australian Securities Commission, assumed responsibility for administration of such laws.[4] It was renamed the Australian Securities and Investments Commission ("ASIC") in 1998, when its responsibilities were extended to include consumer protection in relation to financial services generally.

In 2001, the regulatory regime was placed on a new legislative footing when the Australian Parliament enacted the Corporations Act 2001[5] and the Australian Securities and Investments Commission Act 2001 ("ASIC Act").[6] The Corporations Act included provisions regulating companies and securities markets in similar terms to the former state and territory laws which it replaced.

Chapter 7 of the Corporations Act begins with a broad mandate to make markets transparent and fair to investors.[7] This mandate is implemented by detailed provisions regulating: (i) financial markets; (ii) clearance and settlement facilities; (iii) providers

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[4] Established under the Australian Securities Commission Act 1989. Act No. 90 of 1989.

[5] Act No. 50 of 2001.

[6] Act No. 51 of 2001. As a result, corporate creation and governance are a federal function in Australia, unlike the position in the United States. This has been achieved through an extended constitutional dialogue between the Australian federal government and the governments of the states and territories that comprise the Commonwealth of Australia. The states also have the constitutional ability to regulate certain corporations: *see NSW v. The Commonwealth* (1990) 169 CLR 482. (Austl.)

[7] Chapter 7, § 760A.

of financial services; and (iv) the issue, sale and purchase of financial products.[8]

Part 7.10 contains prohibitions relating to insider trading, market manipulations and various other types of fraudulent and misleading conduct. Prohibited conduct includes:

- Market manipulation (§1041A);
- False trading and market rigging (creating a false or misleading appearance of active trading etc (§1041B); artificially maintaining etc trading price (§1041C));
- Dissemination of information about illegal transactions (§1041D);
- False or misleading statements (§1041E);
- Inducing persons to deal (§1041F);
- Dishonest conduct (§1042G); and
- Misleading or deceptive conduct (§1041H).

With the exception of misleading or deceptive conduct (§1041H), for which there is civil liability only, these are all criminal offenses and breaches are subject to both criminal prosecutions and civil actions.

The civil actions and their availability to plaintiffs of the kind represented in this case are discussed in Section III of this Brief.

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[8] Chapter 7, Parts 7.2, 7.3, 7.6, 7.7 and 7.9. Disclosure in relation to offers of securities is dealt with in Chapter 6D.

B. Effective Regulatory Oversight and Enforcement Is Provided by the Australian Securities and Investments Commission

The ASIC Act imposes on ASIC a number of broad duties, including to "promote the confident and informed participation of investors and consumers in the financial system...".[9]

ASIC has the power to compel production of evidence, undertake non-public oral examinations, apply for court orders to compel production, and conduct a range of administrative proceedings.

ASIC's remedial powers are broad and diverse. For example, it can change the conditions of those holding securities licenses, give directions to the operators of licensed markets, and issue orders stopping offers of securities and other financial products.[10] It can go to court to obtain a wide range of civil remedies.[11] ASIC also has the power to investigate infringements, and institute criminal prosecutions for violations, of the Corporations Act and the ASIC Act.[12] About 20% of ASIC's 1817 employees are engaged in enforcement activities.

Finally, under § 50 of the ASIC Act, ASIC has the important right to institute civil proceedings on behalf of victims of a securities fraud. As a former ASIC Deputy Chairman has explained, "Where ASIC exercises its powers under §50, shareholders reap the advantages from the representation of a single, spe-

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[9] ASIC Act, §1(2).

[10] Corporations Act, §§ 914A, 794D, 1020E and 739.

[11] Corporations Act, §§ 1043L(6) and 1325.

[12] ASIC Act, §49; Corporations Act, §1315.

cialized body, with economies of scale and vast experience in securities fraud."[13]

C. Australia Cooperates Internationally in the Regulation of Securities Markets, Both Multilaterally and Bilaterally

ASIC has long recognized the importance of close cooperation with securities regulators in other countries. It has put in place and is continuing to develop effective bilateral and multilateral arrangements for enhanced enforcement and comprehensive supervisory cooperation.

ASIC has extensive information gathering and information sharing powers (including with overseas regulators). ASIC can and has conducted surveillance with an overseas regulator where both regulators are dealing with breaches of their own laws. ASIC is a participant in the International Organization of Securities Commissions ("IOSCO") and a signatory of the IOSCO 2002 Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.[14] It has a strong commitment to, and a strong record of, timely and effective agency-to-agency cooperation.

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[13] Jeremy Cooper, "Corporate wrongdoing: ASIC's enforcement role," Melbourne, December 2, 2005, at 10, *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/$file/ICAC2005_speech_021205.pdf.

[14] *Available at* www.sec.gov/about/offices/oia/oia_bilateral/iosco.pdf.

D. There Is a Strong Cooperative Relationship Between ASIC and the SEC in Information Exchange and Enforcement

ASIC has had a sustained commitment to bilateral cooperation with the United States. The SEC has acknowledged that it and ASIC "have developed a close partnership on enforcement and regulatory issues."[15] This cooperative relationship has been formalized in various arrangements since 1993, which have facilitated regular exchanges of information and successful enforcement outcomes. By way of example, a successful action was taken recently in Australia against a U.S.-based entity (which operated in Australia) for misleading and deceptive conduct.[16]

In August 2008, the SEC and ASIC entered into a Mutual Recognition Arrangement which provides a framework for considering regulatory exemptions that would permit U.S. and Australian stock exchanges and broker-dealers to operate in both jurisdictions, without the need to be separately regulated by those jurisdictions in all respects.[17] It is under-

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[15] Press Release, *SEC Chairman Cox, Prime Minister Rudd Meet Amid U.S.-Mutual Recognition Talks*, (March 29, 2008) *at* http://www.sec.gov/news/press/2008/2008-52.htm

[16] *See* Press Release, Australian Securities and Investments Commission, *Supreme Court Issues Final Order on Cyclone Magnetic Engines*, (August 4, 2009), *at* http://www.asic.gov.au/asic/asic.nsf/byheadline/09-134AD+Supreme+Court+issues+final+orders+on+Cyclone+Magnetic+Engines?openDocument.

[17] Press Release, SEC, *Australian Authorities Sign Mutual Recognition Agreement*, (August 25, 2008), *at* http://www.sec.gov/news/press/2008/2008-182.htm

pinned by mutual recognition of the significant investor protection provided under both Australian and U.S. laws, and enhanced enforcement and supervisory cooperation arrangements.

E. The Extraterritorial Jurisdictional Scope of Australia's Legislative Regime Is Expressly Provided For

The market misconduct provisions in Part 7.10 of the Corporations Act apply to certain acts or omissions outside of Australia, but only when they are tied to conduct and effects in Australia. These include:

- manipulating a financial market *in Australia*;
- false trading on a financial market *in Australia*;
- dissemination of information about illegal transactions on a financial market *in Australia*; and
- making materially false or misleading statements that are likely to have the effect of increasing, reducing or maintaining the prices on a financial market *in Australia*.[18]

The ASIC Act also has provisions that reflect an Australia-focused approach to extraterritoriality. Section 12AC(1) extends various of the Act's prohibitions to conduct engaged in outside of Australia by: "(a) bodies corporate incorporated or carrying on business within Australia; or (b) Australian citizens; or (c) persons ordinarily resident within Australia."

Thus, the Corporations Act and the ASIC Act differ from the approach taken by the U.S. Congress in the

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[18] *See* Corporations Act, §§1041B, 1041C, 1041D, 1041E; *see especially* §1041E(1)(b)(iii).

Securities Exchange Act of 1934, which was silent on the issue of extraterritorial application.

F. The Differences that Exist Between Australia and the United States on Securities Regulation Issues Generally Represent Public Policy Choices on Which Different Sovereigns May Reasonably Differ

When Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, it was engaged in a pioneering exercise in market regulation at a time when securities markets were far less global than they are today. Congress spelled out general principles and prohibitions, while leaving detailed determinations to be made by the SEC and the federal courts.

Later in the century, Australia established a comprehensive and highly detailed legislative regime reflecting a series of different sovereign choices. By way of example, the Australian Parliament has enacted criminal prohibitions for a wide range of specific wrongs, while the United States has tended to rely on broad antifraud provisions to prosecute the narrower range of securities misconduct that would sometimes be treated as criminal. Australia's legislation also specifies when injured parties are permitted to bring civil actions, while the U.S. approach (exemplified by § 10(b)) has been to permit such policy decisions to be fashioned by the courts.

II. THE NATIONAL AUSTRALIA BANK IS SUBJECT TO AUSTRALIA'S COMPREHENSIVE SYSTEM OF SECURITIES MARKET REGULATION, WHICH IS BASED UPON A SECURITIES ISSUER HAVING AN APPROPRIATE NEXUS TO AUSTRALIA

A. The National Australia Bank Is Regulated Under the Corporations Act and the ASIC Act

As an Australian company issuing securities in Australia, NAB is fully subject to regulation by ASIC under the regime described in Section I of this Brief. It is required to file annual and semiannual financial reports with ASIC under the Corporations Act.[19] It is also required by the Corporations Act to meet a continuous disclosure obligation in relation to the Australian Securities Exchange, where its shares are traded.[20]

B. Actions and Statements of the National Australia Bank

On July 5, 2001, NAB announced a write-down of $A888 million of the balance sheet value of the mortgage servicing rights ("MSRs") held by its U.S. subsidiary HomeSide Lending Inc ("HomeSide").[21] NAB attributed the write-down to: unprecedented refinancing of mortgages; interest rate volatility; and

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[19] *See, e.g.*, §§285, 292, 295, 302, 319-320.

[20] *See* §674.

[21] In July 2001, $A888 million was equivalent to US$450 million.

market changes caused by issuance of new accounting standards.[22]

A second, larger write-down of approximately $A3.05 billion was announced on September 3, 2001.[23] In its media release, NAB attributed the write-down to three causes—the recently discovered mistaken interest rate assumption used by HomeSide in valuing MSRs ($A755 million); continuing unprecedented uncertainty and turbulence in the U.S. mortgage servicing market ($A1.436 billion); and write-off of goodwill ($A858 million).[24]

These and other subsequent public announcements were made in Australia. They attracted a great deal of attention in Australia because NAB is one of the country's largest publicly traded corporations and a high proportion of its shares are owned by Australians.

C. Public Statements From the ASIC Chairman on the National Australia Bank's Prompt Response to the Decline in HomeSide's Financial Position

Two days after NAB had issued its September 3, 2001 media release announcing the further write-

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[22] Press Release, *National Announces HomeSide Provision*, NAB media release (July 5, 2001), *at* http://www.nabgroup.com/0,,33523,00.html.

[23] Press Release, *National Foreshadows Homeside Provision*, NAB media release (September 3, 2001), *available at* http://www.nabgroup.com/0,,33529,00.html.

[24] In September 2001, $A755 million was equivalent to US$400 million and $A1.436 billion was equivalent to US$760 million. $A858 million was equivalent to US$590 million at the historical exchange rate applicable at the time HomeSide was acquired by NAB.

down, the then ASIC Chairman, David Knott, made comments (reported in *The Australian Financial Review*) that NAB had responded promptly in disclosing the consequences of the decline in HomeSide's financial position to the market.[25] It is clear from Mr. Knott's comments that ASIC was satisfied with how NAB was handling the situation.

While ASIC did not take action vis-a-vis the NAB write-downs, shortly thereafter it successfully brought two civil penalty actions against other entities for breaches of the continuous disclosure obligations under the Corporations Act, where inadequate disclosure to the market had resulted in a significant fall in the market value of the shares of the relevant entities.[26]

III. AUSTRALIA PROVIDES APPROPRIATE CIVIL REMEDIES FOR PLAINTIFFS THAT HAVE SUFFERED LOSS OR DAMAGE FROM VIOLATIONS OF SECURITIES LAWS UNDER SPECIFIC PROVISIONS OF THE CORPORATIONS ACT AND THE ASIC ACT

A. There Is a Clear Statutory Basis for Private Actions in Australia Relating to Securities Violations

As noted, Chapter 7 of the Corporations Act provides a considerable range of civil remedies for

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[25] J. Breusch and M. Mellish, "ASIC praises NAB for quick disclosure" *The Australian Financial Review*, September 5, 2001 at 40.

[26] *ASIC v Southcorp* [2003] FCA 1369, (2003) 130 FCR 406; *ASIC v Chemeq Ltd* [2006] FCA 936, (2006) 234 ALR 511. (Austl.)

investors injured by particular infringements caused by issuers, licensed participants and others. Civil remedies that may apply to a claim of the type alleged in this case are found in Part 7.10. In that Part, §1041I makes available private civil actions for those injured by: (i) false and misleading conduct (§ 1041E); (ii) improperly inducing someone to deal (§ 1041F); (iii) dishonest conduct (§1041G); or (iv) misleading or deceptive conduct (§1041H).

A contravention of the continuous disclosure requirements in Chapter 6CA of the Corporations Act that are applicable to listed entities may also give rise to civil damages. By §674, such entities are required to comply with the continuous disclosure requirements in the listing rules of the financial markets on which their securities are traded (in NAB's case the Australian Securities Exchange). Section 1317HA empowers a court to order the payment of compensation for damages suffered as a result of a contravention of § 674.

The ASIC Act also provides a private civil action in § 12GF for those injured by: (i) unconscionable conduct (§§ 12CA-CC); (ii) misleading or deceptive conduct (§ 12DA); or (iii) false or misleading representations (§ 12DB).

Civil actions under the Corporations Act and the ASIC Act can be brought in a federal court or the courts of an Australian state or territory having jurisdiction over the defendant(s). Appellate review is available in each jurisdiction.

B. Class Actions Are Available in Australia and Such Actions Have Been Brought by Shareholders

Class actions have been provided for by statute in Australia for almost 20 years and a robust securities class action practice has evolved. The practical importance of securities class actions was emphasized in a paper presented at the 2009 Annual Legal Convention of the Law Council of Australia:

> Australia is one of the few (but increasing number of) jurisdictions outside of the United States to adopt a legislative regime for the grouping of claims... *Class actions have been described as something of a hallmark of the Australian litigation landscape.*[27]

The statutory basis for class actions in Australia was provided with the 1992 enactment of Part IVA (Representative proceedings) of the Federal Court of Australia Act 1976.[28] In Parliament, the then Attorney-General explained the purposes of the class action regime in the following terms:

> [To] give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action....
>
> [T]o deal efficiently with the situation where the damages sought by each claimant are large

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[27] D. Grave and R. Maloney, "Securities Law Class Actions: Recent Developments in Australia and the United States" (September 18, 2009) ("Grave & Maloney") § 2.1 (emphasis added) (footnote omitted).

[28] The amendment was provided for by the Federal Court of Australia Amendment Act 1991. Act No. 181 of 1991.

> enough to justify individual actions and a large number of persons wish to sue the respondent.[29]

As in the United States, the class action regime is an "opt out" system[30]—which "generally increases the size of class actions by placing the onus of withdrawal on the individual members so that those who are inactive or not aware of the proceedings are included".[31]

Senior ASIC officials have also welcomed the creation of this type of action. In 2005, ASIC's Deputy Chairman explained that "[t]he increase in shareholder vigilance, coupled with the emergence of shareholder class actions, means that ASIC is better able to focus on its surveillance and enforcement functions while shareholders play a proactive role in protecting their interests...."[32]

The Australian class action process differs from the U.S. model in certain significant ways. *First*, no initial class certification is required in Australia. The burden is thus placed on the respondent to show that it is not appropriate for the claims of the plaintiffs to be pursued by way of the class action.[33] *Secondly*, Rule 23(b)(3) of the U.S. Federal Rules of Civil Proce-

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[29] Michael Duffy MP, Att'y Gen., Fed. Ct. of Austl. Amend. B. 1991, Second Reading Speech, quoted in the Hansard of the House of Representatives (November 14, 1991).

[30] Federal Court Act, §33J.

[31] M.J. Lecky, *Shareholder Class Actions in Australia—The Perfect Storm?* 31 UNSW LAW J. 669 at 693-694 (2008).

[32] Jeremy Cooper, "Corporate Wrongdoing: ASIC's Enforcement Role" (supra n.13 at 11, 15).

[33] Federal Court Act, §33N. But the absence of initial classification in Australia is balanced by the presence of a "loser pays" cost rule.

dure requires that the issues common to the class must "predominate" over the individual issues, while the Australian statute requires only that there exist a "substantial common issue of law or fact."[34] *Thirdly*, unlike the position in the United States,[35] there is no doctrine of "fraud on the market" accepted in Australian law. Each shareholder plaintiff must be able to demonstrate a link between the conduct complained of, and the loss suffered, before a right to compensation will arise. *Fourthly*, external funding support is very important because Australia, like most other countries outside the United States, has the so-called "English" (or "loser pays") litigation costs rule.[36]

In 2006, the High Court of Australia affirmed that external funding is legally permissible in Australia.[37] External funding organizations may fund all or part of the plaintiffs' litigation costs in return for a share of any judgment or settlement. The availability of external funding appears to have contributed to the growth of securities class actions in recent years.[38]

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[34] Section 33C(1) of the Federal Court Act and §33C(1) of the Supreme Court Act 1986 (Vict.) (Austl.); *see also* Grave & Maloney (supra n [26] at 2.1(b)).

[35] *Basic Inc v. Levinson*, 485 U.S. 224 at 244 (1988).

[36] *Milne v. Att'y Gen. (Tas)*, (1956) 95 CLR 460 (Austl.); *Oshlack v Richmond River Council* (1998) 193 CLR 72 (Austl.)

[37] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 (Austl.)

[38] *See* Charles River Associates, "Recent Trends in Australian Securities Class Actions" (Dec 2009) *available at* http://www.crai.com/uploadedFiles/Publications/FinancialMarkets_Insights_1209.pdf. According to this report, one securities class action case was filed each year in 1999-2002 and 2005, and two cases were filed each year in 2003 and 2004. Thereafter, three cases

Two commentators writing in 2008 saw this as part of a broader trend:

> While plaintiffs were, at least initially, slow to adopt the new procedure, class actions are now a prominent feature of both the Australian legal landscape and the Australian psyche. Indeed, it is now said that Australia is the place outside North America where a corporation will most likely find itself defending a class action.[39]

Finally, ASIC, using its statutory power to institute civil actions on behalf of injured investors,[40] has brought class actions in circumstances where it believed that the victims lacked the financial resources to pursue the case themselves.[41] To date, ASIC has brought at least nine securities class actions on behalf of victims.[42] In the still-pending Westpoint-related financial products cases, ASIC has already

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were filed in 2006, five were filed in 2007, eight were filed in 2008, and at least nine were filed in 2009.

[39] S. Clark and C. Harris, *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?* 32 MELB. U.L. REV. 775 at 777 (2008).

[40] *See* discussion in Section I.B of this Brief.

[41] Letter from Tony D'Aloisio, Chariman, Australian Securities and Investments Commission, to Westpoint Investors (December 21, 2009) (summarizing ASIC's ongoing litigation efforts on their behalf), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Westpoint-letter-december-2009.pdf/$file/Westpoint-letter-december-2009.pdf and Press Release, Australian Securities and Investments Commission, ASIC commences investor protection class action (November 5, 1999), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/99-405.pdf/$file/99-405.pdf

[42] A. Boxsell, "Vic Takes the Lead in Class Actions" *The Australian Financial Review* (December 4, 2009), at 46.

recovered for investors some $A100 million of the $A388 million invested.[43]

C. A Class Action Could Have Been Brought in Australia Under the Corporations Act in Relation to the Type of Conduct Alleged in this Case

At the time NAB first wrote down the value of its HomeSide subsidiary early in July 2001, §995(2) of the Corporations Law (the legislation preceding the Corporations Act) contained a prohibition against misleading or deceptive conduct in connection with the publication of securities notices. In addition, §999 of the Corporations Law prohibited false or misleading statements likely to induce the sale or purchase of securities. Section 1005 of the Corporations Law provided a civil action for violation of these provisions.

Sections 995(2) and 999 of the Corporations Law have since been replaced with the current §§1041H and 1041E of the Corporations Act. Any claim that the Petitioners or any other NAB shareholders had under the original Corporations Law would have survived.[44] As noted, class action rights under the Federal Court of Australia Act have been available since 1992.

Thus, the Petitioners were not obliged to initiate an action in the United States to seek compensation

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[43] Press Release, *Steps taken by ASIC to recover funds for the benefit of Westpoint investors* (February 19, 2009), *available at* https://westpoint.asic.gov.au/.

[44] Corporations Act 2001, §1400. *See also* Acts Interpretation Act 1901, §8, Act No. 2 of 1901. Section 8 provides that the repeal of an Act does not affect any right, privilege, obligation or liability which accrued under that Act.

for the damage they claim to have suffered. That course of action was open to them in Australia.

D. Significant Procedural Differences Between Civil Actions That Can Be Brought in Australia and the United States Reflect Public Policy Choices

The present case is one of many in which foreign plaintiffs seek to bring an essentially foreign dispute before U.S. courts, as they did in the case giving rise to this Court's *Empagran* decision. The attractiveness of the United States as a forum for foreign plaintiffs can in part be traced to plaintiffs receiving some advantages in the U.S. legal system that are generally not available in other countries.

There are a number of such advantages. *First*, the so-called "American rule" on litigation costs requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs;[45] and generally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear. *Secondly*, the right to a jury trial in a civil case, guaranteed by the Seventh Amendment to the U.S. Constitution, is generally not available elsewhere. *Thirdly*, the "opt out" class action provided for in the United States has not been favored by other countries (although it has been adopted by Australia). *Fourthly*, punitive damages are available in the United States, but generally not elsewhere.

The different approaches on these matters reflect choices made by the United States, Australia and

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[45] *See Alyesha Pipeline Service Co. v. Wilderness Society*, 421 U.S. 252 (1975).

other countries. Adopting appropriate legal processes is a basic sovereign function on which reasonable sovereigns can differ.

The Australian Government respectfully asks that this Court apply the considerations of comity that it emphasized six years ago in *Empagran* and respect Australia's sovereign judgments on civil procedures, especially when the litigation concerns Australian citizens suing an Australian corporation over conduct that occurred in Australia.

IV. PRINCIPLES OF INTERNATIONAL LAW AND COMITY, ADOPTED BY THIS COURT IN OTHER CONTEXTS, SHOULD BE APPLIED IN ORDER TO AVOID UNNECESSARY CONFLICTS OF SOVEREIGNTY AND RESULTING BURDENS ON THE U.S. COURTS

A. Basic International Law Principles of Jurisdiction

"[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains," is what Chief Justice Marshall wrote for this Court in 1804. *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("*The Charming Betsy*"). This core principle of American jurisprudence has been regularly reaffirmed by this Court. *See, e.g., Weinberger v. Rossi,* 456 U.S. 25, 32 (1982).

The Australian High Court has also repeatedly affirmed that "a statute... is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law." *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384. (Austl.)

It is a fundamental principle of international law that each state is equally entitled to prescribe laws and to adjudicate claims regarding those persons within its territory. Where jurisdiction is claimed by more than one state, any state exercising extra-territorial jurisdiction should act in a way that is compatible with the exercise of jurisdiction by other states. Overly broad assertions of extraterritorial jurisdiction may infringe upon the rights of another state to regulate matters that take place within its territory.

International law recognizes that the various grounds on which jurisdiction may be asserted are "parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states." Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992).

The primary basis for jurisdiction under international law is territorial: each state may regulate activity that occurs in its own territory (the "territorial principle"). States may also extend the application of their laws to their citizens, wherever located (the "nationality principle"). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT") §402(1) (1987); *see also American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

The sometimes controversial "effects doctrine" may allow a state to assert prescriptive jurisdiction over events that have a clear effect in its territory, even if

all planning and execution took place elsewhere. *See Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796 (1993); *see generally* RESTATEMENT §§ 402(1)(c), 403(2).

B. The Modern Decisions of This Court Recognizing Comity

In 2004, this Court decided two cases in which aliens asserted claims against other aliens for injuries suffered outside the United States: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("*Sosa*") and *Empagran*. On both occasions, the Court made clear that U.S. law is to be interpreted to minimize conflicts of jurisdiction. In *Sosa,* the majority opinion noted the need for caution by U.S. courts when considering rules that went "so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727. In *Empagran,* the Court (citing *The Charming Betsy* and a string of later decisions) unanimously said, "[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations....This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow." 542 U.S. at 165.

Sosa and *Empagran* reinforce this Court's earlier decisions that had long held that unless Congress clearly expresses a contrary intent, courts must presume that U.S. law is "primarily concerned with domestic conditions." *E.E.O.C v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). This rule of comity is underscored by a point which the Court made in *Aramco* that is particularly relevant to the present case:

> If petitioners are correct..., a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk....Without clearer evidence of congressional intent to do so..., we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

Id. at 255.

Comity concerns more than mere politeness. "If other nations believe that American policy unfairly disadvantages their citizens... they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own." Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1321 (1985). In the past, other nations (including Australia) have enacted measures to restrain efforts to enforce U.S. law extraterritorially; the clearest examples were the "blocking" statutes that Australia and other countries enacted in the 1980's in response to what were regarded as overly broad jurisdictional claims being made under U.S. antitrust laws in cases involving the uranium industry.[46] *See* Warren Pengilley, *Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View From "Down Under,"* 16 VAND. J. TRANSNAT'L L. 833, 871-72 (1983).

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[46] *See, e.g.*, U.K. Protection of Trading Interests Act, §6 (1980); Australia's Foreign Proceedings (Excess of Jurisdiction) Act 1984. Act No. 3 of 1984. *See also Predictability and Comity, supra*, 98 HARV. L. REV. at 1311 n.6 (describing the "main categories" of retaliatory legislation).

C. Principles of International Law and Comity Should be Applied in Construing a Judicially Created Right of Action

From *The Charming Betsy* onward, this Court's decisions have focused on how to construe statutes with due regard for international law and considerations of international comity. The Australian Government respectfully submits that, if these considerations normally control when a court is construing a statute, they must also control when a court is construing a judicially-created right of action that has been implied from a statute. Surely there is every reason for this Court to affirm that U.S. federal judges, when creating and applying an implied right of action under a federal statute, should be equally required to take account of the legitimate sovereign interests of other nations.

Some of the earlier decisions under Rule 10b-5 apparently assumed that foreign securities fraud laws were weak or non-existent and, as such, there would be no conflict or comity concerns flowing from U.S. enforcement.[47] This is clearly not the case today—Australia and many other countries have enacted comprehensive securities regulatory regimes that provide legal remedies for parties injured by securities fraud.

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[47] *See, e.g., Morrison*, 547 F.3d. at 175 quoting Judge Friendly's opinion in *IIT, Int'l. Inv. Trust v. Cornfield*, 619 F.2d 909, 921 (2d Cir. 1980) ("The primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than [a foreign state's], that country will surely not be offended by their application.").

V. ASSERTION OF JURISDICTION BY U.S. COURTS UNDER § 10(b) IN CASES LACKING SUFFICIENT U.S. NEXUS RISKS UNDERMINING THE EFFECTIVENESS OF SECURITIES MARKET REGULATION IN COUNTRIES SUCH AS AUSTRALIA

A. The Lower Courts Correctly Found That the Nexus to the United States Is Insufficient in this Case

This case falls within an increasingly common category of private class actions which have become known as "foreign-cubed" cases. The Court of Appeals noted that the *Morrison* case fits the category because it involves "a set of (1) *foreign* plaintiffs ... suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries." 547 F.3d at 172 (emphasis in original).

This Court has recognized that principles of international law and comity require a sufficient nexus to exist between a state and the matter over which it seeks to exercise jurisdiction. In the present case, the strength of the nexus to Australia both as to nationality and territory is evident. This nexus brings the matter within the proper scope of Australia's legal and regulatory regimes in relation to securities.

The Australian Government respectfully submits that the facts of this case as alleged in the complaint and found by the lower courts do not give rise to a sufficient nexus for the exercise of jurisdiction by U.S. courts. There is not an accepted legal basis for allowing Australian shareholders to bring a claim in

a U.S. court under U.S. law for conduct of an Australian issuer that occurred in Australia and is subject to regulation by the Australian securities regulator (ASIC) under Australian law, as outlined in Sections I-III of this Brief.

Both the District Court and the Court of Appeals found that the conduct of HomeSide, while it occurred in the United States, did not provide a proximate cause or a sufficient nexus to support a Rule 10b-5 action by Australian plaintiffs against an Australian issuer of securities for information distributed to them in Australia. Although the Australian Government would not necessarily endorse all of the reasoning of the lower courts, the Government does consider the courts were essentially correct in dealing with factual allegations in the case and therefore granting the Respondents' motion to dismiss the Petitioners' action.

B. The U.S. Courts of Appeals Have Applied a "Conduct" Test and an "Effects" Test to Determine Whether There Is Subject Matter Jurisdiction Under § 10(b)

The Second Circuit Court of Appeals identified the challenge that the lower courts have faced in dealing with securities law claims with an international component under § 10(b), stating that, "[w]hen Congress wrote the Securities Exchange Act...it omitted any discussion of its application to transactions taking place outside of the United States". *Morrison,* 547 F.3d at 170.

The Seventh Circuit Court of Appeals summarized the practical consequences of this situation when it said:

> Identification of those circumstances that warrant such regulation has produced a disparity in approach, to some degree doctrinal and to some degree attitudinal, as the courts have striven to implement, in Judge Friendly's words, "what Congress would have wished if these problems had occurred to it".

Kauther SDN v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.1975)).

In trying to bring order to this situation, the Courts of Appeals—particularly the Second Circuit—have gradually developed two tests to determine the extra-territorial reach of § 10(b); these are the "effects" test and the "conduct" test. The former involves an analysis of whether "wrongful conduct had a substantial effect in the United States or upon U.S. citizens" and the latter "whether wrongful conduct occurred in the United States". *Morrison* 547 F.3d at 171.

The present case only concerns the application of the "conduct" test. As developed principally in the Second Circuit Court of Appeals, the "conduct" test rests on the view that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1017 (2d. Cir. 1975). Therefore, "this basis for jurisdiction is limited to *the perpetration of fraudulent acts themselves* and does not extend to mere preparatory activities." *Id.* at 1018 (emphasis added). The same point was made in *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d. Cir. 1975) (holding "the anti-fraud provisions of the federal securities laws...[d]o not apply to losses from

securities to foreigners outside the United States unless action (or culpable failures to act) within the United States *directly caused* such losses") (emphasis added).

Thus, for U.S. jurisdiction to be exercised under the "conduct" test, activities in the United States must rise beyond the level of mere preparation for an alleged fraud. *Morrison*, 547 F.3d at 171; *see also Alfadda v. Fenn*, 935 F.2d 475, 478 (2d. Cir 1991); *Bersch*, 519 F.2d at 986.

C. The "Conduct" Test Can Lead to a Complex Factual Analysis That Sometimes Results in (i) Individual Cases Being Decided on "Very Fine Distinctions" and (ii) Actions With an Insufficient Nexus to the United States Being Allowed to Proceed

The various formulations of the "conduct" test have invited detailed (and sometimes diverse) judicial inquiries into the factual circumstances of individual cases. The difficulty with the "conduct" test may, at least in part, result from the complexity of the analysis where conduct occurring in the United States is weighed to determine exactly what role it played in the chain of causation that led to an alleged securities fraud. As such, cases may be decided on "very fine distinctions", leading to "unpredictability...in jurisdictional analysis", as described by Professor Buxbaum in her widely cited article *Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNATIONAL L. 14, 67 (2007).

The Australian Government respectfully suggests that this Court use this opportunity to mandate a

more structured (and hence predictable) approach in such cases. The Australian Government believes that the complexity of the analysis may be reduced if attention is focused on where the alleged wrongful disclosure (or non-disclosure) occurred that induced a foreign investor to engage in a purchase or sale transaction involving securities on a foreign exchange. Where such disclosure (or non-disclosure) was made by a foreign issuer in its own market, a sufficient nexus to the United States would not exist to justify a Rule 10b-5 action in the U.S. federal courts. *See Zoelsch v. Arthur Andersen & Co.*, 824 F. 2d 27 (D.C. Cir. 1987) (no Rule 10b-5 liability for a U.S. accounting firm that gave allegedly inaccurate information to a German accounting firm that included the information in a public report distributed to the German plaintiffs). In these circumstances, no elaborate inquiry into whatever prior conduct occurred in the United States would normally be required.

D. The Present Case Lacks the Factual Nexus Between the United States and the Petitioners' Alleged Injury that Is Necessary to Provide Jurisdiction in a U.S. Court

1. The U.S. Nexus Is Legally Insufficient Where the Information Relied Upon by Foreign Investors in a Foreign Company Was Distributed to Them in Their Home Market by the Issuing Company

The Court of Appeals ultimately identified the controlling facts that the Australian Government respectfully suggests should be allowed to govern (and hence simplify) the jurisdictional analysis in

"foreign-cubed" securities cases. The Court focused on those responsible for issuing the information that allegedly induced the Australian Plaintiffs to purchase shares in NAB on an Australian stock exchange:

> NAB, not HomeSide, is the publicly traded company, and its executives—assisted by lawyers, accountants, and bankers—take primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world...
>
> NAB's executives possess the responsibility to present accurate information to the investing public and to the holders of its ordinary shares in accordance with a host of accounting, legal and regulatory standards. *When a statement or public filing fails to meet these standards, the responsibility, as a practical matter, lies in Australia, not Florida.*

547 F.3d at 176 (emphasis added). These facts alone should be determinative. The Australian Government respectfully submits that, whenever allegations turn on the disclosure (or non-disclosure) of information by a foreign issuer to a foreign exchange on which the foreign issuer's securities were bought or sold by the foreign investor-plaintiffs, a motion to dismiss or a summary judgment motion should be granted.

2. The Result in This Case Should Be the Same Whether This Is Treated as a "Subject Matter Jurisdiction" Rule or a "Scope of the Offense" Rule

Uniformly, when addressing the issue of the transnational reach of § 10(b), the Courts of Appeals have

found that the issue is one of subject matter jurisdiction. *See, e.g., SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979) (Continental Grain); *S.E.C. v. Kasser*, 548 F.2d 109, 116 (3d Cir.), cert. denied, 431U.S. 938 (1977); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 984 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).

However, the Solicitor General's Brief at the *certiorari* stage of this case questioned this approach, arguing that, in *Arbaugh*, 546 U.S. at 516, this Court established that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *U.S. Brief, supra* Note 3, at 8-9. The Solicitor General went on to argue that "in cases involving transnational fraud, the private plaintiff should be required to demonstrate a direct causal link between his injury and the component of the scheme that occurred in the United States." *Id.* at 10.

Irrespective of whether the issue is best categorized as a question of "subject matter jurisdiction" or a non-jurisdictional question of the "plaintiffs' entitlement to relief", the result is the same in this case: the alleged facts do not provide a sufficient basis to support a private suit under § 10(b) and Rule 10b-5 because information was disclosed (or not disclosed) to a foreign exchange on which the foreign issuer's securities were bought by the foreign investor-plaintiffs.

E. The Type of Proximity-Based Rules That This Court Has Developed in Recent Years to Deal With Foreign Claims Should Resolve This Case

In *Empagran*, this Court had to "focus upon anti-competitive price-fixing activity that is in significant part foreign, that causes some domestic injury, and that independently causes separate foreign injury." 542 U.S.. at 158. This Court unanimously held that the foreign purchasers' actions could not be maintained under the Sherman Act. In the present case, the Court is asked to focus upon *allegedly improper disclosures that were entirely foreign and caused no alleged domestic injury*.

In *Empagran,* having noted that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," *id.* at 164, the Court went on to ask the question which is central to this case:

> But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*.... Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?....
>
> We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign*

> *harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

Id. at 175 (emphasis in the original).

If this Court "can find no good answer" when dealing with a statute long recognized to have some significant extraterritorial effect, then the Australian Government respectfully submits that there would be no "good answer" permitting foreign claimants to bring U.S. securities law claims in relation to foreign conduct under a judge-made legal doctrine when the only alleged damage was suffered outside the United States.

Empagran is not an isolated landmark. In the same Term, the Court decided *Sosa*, in which it was cautious about construing the scope of a statute that specifically authorizes suits by aliens for some internationally-based wrongs, noting that:

> The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to *permit enforcement without the check imposed by prosecutorial discretion*.

542 U.S. at 727 (emphasis added).

The reality that private litigation in different forums under different bodies of law can have a potentially disruptive effect on a detailed system of securities regulation was a central rationale for this Court's 2007 decision in *Credit Suisse Sec. (USA) LLC v. Billings*, 551 U.S. 264 (2007). That was an antitrust case in which the legal issue was whether private plaintiffs were to be permitted to bring class actions challenging conduct by the defendants that

had been subject to detailed regulation by the SEC. The Court reached the conclusion that "to permit antitrust actions such as the present one... [risks] serious securities-related harm". *Id.* at 279. In reaching this conclusion, the Court emphasized that private "plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible [under the securities regulations], it will prove difficult for those many different courts to reach consistent results."[48] *Id.* at 281.

The Australian Government respectfully submits that the present case is analogous in that conflict may arise between different bodies of law in different jurisdictions, should the plaintiffs be permitted to bring a suit in a U.S. court under U.S. law concerning conduct in Australia that was subject to detailed regulation by ASIC under Australian law.

CONCLUSION

The Australian Government respectfully requests that this Court affirm the lower courts' dismissal of the case, and in doing so affirm the applicability of its prior jurisprudence on international law and comity to "foreign-cubed" securities cases.

Respectfully submitted,

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February 26, 2010

AMICUS CURIAE BRIEF

No. 08-1191

In The
Supreme Court of the United States

MORRISON, ET AL., PETITIONERS,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INFINEON TECHNOLOGIES AG AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF INFINEON TECHNOLOGIES AG AS AMICUS CURIAE SUPPORTING RESPONDENTS

Infineon Technologies AG respectfully submits this brief as amicus curiae in support of respondents.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae Infineon Technologies AG is a leading semiconductor and system solutions company that addresses three central challenges to modern society: energy efficiency, communications, and security. In the 2009 fiscal year, Infineon reported sales of €3.03 billion with approximately 25,650 employees worldwide. Headquartered in Neubiberg, Germany, Infineon has a global presence and operates through its subsidiaries in the United States, Singapore, and Japan. Infineon is listed on the Frankfurt Stock Exchange (ticker symbol: IFX) and in the United States on the over-the-counter market OTCQX International Premier (ticker symbol: IFNNY). Before April 2009, Infineon also had its American Depository Shares listed on the New York Stock Exchange; the vast

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[1] Pursuant to Rule 37.3(a), blanket letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

majority of its securities, however, were traded on the Frankfurt Stock Exchange. On April 3, 2009, Infineon announced that it had applied to voluntarily delist from that United States exchange effective April 24, 2009. *See* Press Release, Infineon Techs., *Infineon voluntary delists from New York Stock Exchange* (Apr. 3, 2009), *available at* http://tinyurl.com/ifxdelist (last visited Feb. 24, 2010).

Amicus, having been sued by foreign investors based upon transactions that occurred on a foreign exchange, possesses first-hand knowledge of the extraterritorial application of Section 10(b) by United States courts. In amicus's case, the district court certified a global class of investors, the vast majority of whom reside outside the United States and traded securities on the Frankfurt Stock Exchange. That case is now pending on appeal before the Ninth Circuit under Rule 23(f) of the Federal Rules of Civil Procedure. *In re Infineon Techs. AG Sec. Litig.*, No. 09-15857 (9th Cir. appeal granted Apr. 29, 2009).

While amicus recognizes the United States' interest in deterring and remedying securities fraud perpetrated against the United States capital markets and investors, amicus does not believe that Congress intended for foreign issuers to be subject to liability under United States securities laws in connection with transactions by foreign investors on foreign exchanges. As amicus has experienced, that result discourages foreign companies from seeking to raise capital in the United States. Under the reasoning of the ruling below, a foreign issuer's entrance

into the United States capital markets not only subjects a foreign issuer to liability for transactions that occur on domestic exchanges, but it also potentially subjects the foreign company to liability for transactions by foreign investors that occur outside the United States. Indeed, although the court of appeals in the present case properly held that petitioners' securities fraud claims do not fall within the scope of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the court below and several other courts of appeals employ an unpredictable and highly fact-specific approach to determine when Section 10(b) provides a private right of action in United States courts to foreign investors who purchased securities on foreign exchanges.

Accordingly, amicus has a strong interest in this Court's affirming the judgment below and in ensuring that the scope of the Securities Exchange Act's antifraud provisions do not encompass claims by foreign investors who purchased securities of foreign issuers on foreign exchanges.

SUMMARY OF ARGUMENT

A.1. As the court below recognized, the plain language of the Securities Exchange Act of 1934 is silent as to whether its antifraud provisions apply outside the United States. In such circumstances, this Court has long held that the laws of the United States are intended to apply only within the territorial jurisdiction of this nation, and the Court construes statutes that are ambiguous so as to avoid unreasonable conflict with the laws of other nations. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). Congressional silence thus dictates that Section 10(b) of the Securities Exchange Act should not apply to claims against foreign issuers by foreign investors who purchased their securities on foreign capital markets; rather, such investors should be required to seek relief under the laws of their own countries or under the regulatory regimes that govern the foreign exchange.

Notwithstanding these principles, the court of appeals in this case, while correctly ruling that it could not adjudicate the securities fraud claims by these foreign investors, applied an unpredictable and fact-specific test that seeks to discern whether Congress would have intended Section 10(b) to apply to certain international transactions that have no effect on the United States capital markets or investors. But that result cannot be reconciled with the text or history of the act. Congress made clear in Section 30(b), 15 U.S.C. § 78dd(b), that it was concerned with securities transactions outside the United States only

if they harmed the United States capital markets or investors. And, to the extent the implied private right of action under Section 10(b) should be expanded in scope as to "who" can sue, that is a decision for Congress, not the courts. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

2. Even if this Court were to conclude that Section 10(b) applies to some claims by foreign investors who purchased securities of foreign issuers on foreign exchanges, the Court should limit such suits in a manner that minimizes interference with the sovereign authority of other nations and ensures that this nation's scarce judicial resources are used only when significant and material United States conduct is the direct cause of the harm that the foreign investors allege.

B. Other nations also have a strong interest in protecting their capital markets and investors. But foreign governments have adopted different means to prevent securities fraud that are often incompatible with the United States private securities class action model. Indeed, other nations, such as Germany where amicus is headquartered, have established exclusive jurisdiction in their courts over private securities fraud lawsuits to prevent such actions from being litigated outside of their courts. And these nations have their own rules of civil procedure that are often incompatible with the class action rules in Rule 23 of the Federal Rules of Civil Procedure.

The effect of this conflict of laws is not academic. Because many nations will not recognize or enforce a United States class action judgment, a judgment in the United States will almost never bind the absent foreign investors who purchased securities on foreign exchanges. Thus, even though the potential for claim preclusion underlies the fundamental due process issues inherent in every class action in the United States, private securities fraud class actions by foreign investors deprive defendants of the only real benefit of class certification: a single action to bind all class members.

C. Private securities fraud class actions by foreign investors who purchased securities on foreign exchanges also threaten harm to United States capital markets. Private securities class action litigation presents a unique form of vexatious litigation due to its high settlement value, significant discovery, and immense legal costs, without regard to the underlying merits of the plaintiffs' case. Amicus and other foreign corporations are aware of these dangers associated with United States securities fraud class actions. And amicus agrees with this Court's observation in *Stoneridge* that overseas firms with no other exposure to United States securities laws might very well be deterred from doing business here. Indeed, amicus's experience, like that of many other foreign companies, demonstrates that the costs associated with the United States legal system often outweigh the benefits of participating in the United States capital markets.

ARGUMENT

SECTION 10(B) OF THE SECURITIES EXCHANGE ACT CONFERS NO PRIVATE RIGHT OF ACTION WHERE THERE HAS BEEN NO HARM TO UNITED STATES MARKETS OR INVESTORS

At issue in this case is whether United States courts can adjudicate claims under the United States securities laws brought by foreign investors who traded securities of a foreign company on a foreign stock exchange. The courts of appeals have generally held, and amicus does not contest, that the implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 applies whenever the fraud affects the United States capital markets or investors, even if it was conceived and executed outside the United States.

The lower federal courts have struggled, however, as to whether United States securities laws should apply to claims of foreign investors who purchased securities of foreign companies on foreign exchanges. In the absence of guidance from Congress or this Court, the courts of appeals over the past half-century have developed complicated and unpredictable tests to determine the circumstances in which United States securities laws apply to those claims by foreign investors. These courts have misread congressional silence on the extraterritorial scope of the Securities Exchange Act.

As discussed below, Section 10(b)'s implied private right of action does not extend to foreign purchasers of the securities of foreign issuers on foreign exchanges. Any result to the contrary would interfere with the policy decisions made by other nations and undermine foreign participation in United States capital markets.

A. Congress Did Not Intend For United States Courts To Adjudicate The World's Securities Fraud Actions

1. This Court's presumption against the extraterritorial application of federal law should preclude private securities fraud actions involving the transactions of foreign investors on foreign exchanges

a. This Court has long held "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Because the laws of the United States are presumed to govern only domestically and are not meant to "rule the world," *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007), the Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164; *see also Foley Bros.*, 336 U.S. at 285 (explaining that the Court presumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction

of the United States, * * * based on the assumption that Congress is primarily concerned with domestic conditions"). These rules reflect ordinary principles of international comity—viz., oasic respect for and recognition of the interests of other members of the international community. *Empagran*, 542 U.S. at 164; Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. g (1988). Accordingly, before a United States law is applied abroad, there must be some "indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *EEOC*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285).

In this case, there can be little doubt that Congress did not intend for Section 10(b) of the Securities Exchange Act to create a private right of action for foreign investors who have traded securities on foreign exchanges. The plain language of Section 10(b) provides no indication that it applies to those transactions. Rather, Section 10(b) makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). And, to the extent Congress expressed any view about such transactions on foreign exchanges, Congress explained that the act does not apply to "any person" who "transacts a business in securities without the jurisdiction of the United States, unless he transacts

such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). This provision "rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987).

b. The court below, as well as the other courts of appeals that have addressed this issue, have recognized that, at best, "the Securities Exchange Act is silent as to its extraterritorial application." Pet. App. 7a (quoting *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996)). But rather than follow this Court's presumption, in the face of statutory silence, against the extraterritorial application of United States law, these courts of appeals have created the "conduct" and "effects" tests that attempt to "discern whether Congress *would have wished* the precious resources of the United States courts and law enforcement agencies to be devoted to such transactions." *Id.* at 7a (quoting *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (internal quotation marks omitted and emphasis added), *cert. denied*, 525 U.S. 1139 (1999)). Federal courts thus have applied the Securities Exchange Act to the foreign transactions of foreign investors based on "policy considerations and the courts' best judgment." *Kauthar SDN BHD v. Sternberg*, 149 F.3d

659, 664 (7th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). In so doing, at least one court has "freely acknowledge[d] that if we are asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

Even if inferring what Congress "would have wished" were good judicial policy, those courts misread what Congress would have intended as a matter of legislative policy. The "conduct" and "effects" tests are based on the judicial view that the national legislature never considered the possibility that the international scope of the securities markets would become so extensive. *See, e.g.*, *Zoelsch*, 824 F.2d at 30 (noting that "Congress did not consider how far American courts should have jurisdiction to decide cases involving predominantly foreign securities transactions with some link to the United States" because the "international connections in the securities market w[ere] then not nearly as extensive or complex"); *Bersch*, 519 F.2d at 993 ("The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of off-shore funds thirty years later."). But, as commentators have explained, Congress was well aware in 1933 and 1934 that "the securities markets of the 1920's were highly international." Margaret V. Sachs, *The Int'l Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum.

J. Transnat'l L. 677, 681 (1990); *see also id.* at 691-694. And, to the extent anything can be discerned from the legislative history, it is clear that Congress knew of the countless sums that had been invested and lost in foreign securities, S. Rep. No. 73-47 (1933), but chose to protect domestic, rather than foreign, investors and markets, Sachs, *supra*, at 694-713.

c. Finally, it would be particularly incongruous for this Court to further extend the scope of the implied private right of action under Section 10(b). The implied private right of action under Section 10(b) is entirely a creation by lower federal courts "that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). This Court has "sworn off the habit of venturing beyond Congress's intent" in discerning whether Congress intended a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Thus, in *Stoneridge*, this Court explained that "[t]he determination of *who* can seek a remedy has significant consequences for the reach of federal power." 552 U.S. at 165 (emphasis added). Accordingly, any decision to further extend the scope of the implied private right of action under Section 10(b) "is for Congress," and absent some action by Congress "the § 10(b) private right of action should not be extended beyond its present boundaries." *Ibid.*

Significantly, Congress has not chosen to extend the implied private right of action. Notwithstanding

the ample opportunities that Congress has had in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227], and the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, to expand Section 10(b)'s scope, Congress has given no indication that it believes the implied private right of action applies to transactions by foreign investors abroad. Indeed, when presented with the opportunity to address private securities fraud claims, far from expanding the reach of the private antifraud provisions, Congress instead in the PSLRA "imposed heightened pleading requirements and a loss causation requirement." *Stoneridge*, 552 U.S. at 165 (citing 15 U.S.C. § 78u-4(b)). It thus would be incongruous for this Court, in the face of congressional inaction, to expand the extraterritorial scope of the implied cause of action under Section 10(b).[2]

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[2] Nor should congressional silence be regarded as its acquiescence to the standards applied by the courts of appeals. It is evident that Congress believes that new legislation would be necessary for Section 10(b) to apply abroad. Indeed, Congress currently is considering whether to expand the extraterritorial scope of Section 10(b), *see* Investor Protection Act of 2009, H.R. 3817, 111th Cong., 1st Sess. § 215(b), demonstrating that it believes that the law does not currently allow foreign investors who traded securities on foreign exchanges to bring securities fraud actions in the United States.

2. *Even if Section 10(b) applies to transactions by foreign investors on foreign exchanges, this Court should stringently limit such suits*

To the extent this Court concludes that Section 10(b)'s implied private right of action can apply in some circumstances where there has been no harm to United States capital markets or investors, this Court should limit such suits in a manner that minimizes interference with the sovereign authority of other nations.

If this Court were to adopt a formulation of the approach suggested by the United States in its invitation brief at the certiorari stage, *see* U.S. Pet. Amicus Br. 12-15, the Court should stringently require, at a minimum, that foreign-investor plaintiffs demonstrate that their injury was *directly caused* by *significant* United States securities fraud conduct that formed a *material* component of the alleged violation of section 10(b). *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). Under the current approach used by lower federal courts, plaintiffs repeatedly allege (and courts sometimes permit) a wide range of suits where that standard could not be met.

Indeed, like many other foreign companies that have been sued, amicus has been sued by foreign investors who traded on a foreign exchange who cannot identify significant, material fraudulent domestic conduct that *directly caused* their losses. Instead, they point to the fact that amicus's Germany-drafted

financial statements were translated into English and filed with the SEC or that the company's executives made a few brief appearances on cable television in the United States. *In re Infineon Techs. AG Sec. Litig.*, ___ F.R.D. ___, No. C 04-04156, 2009 WL 3647892, at *4 (N.D. Cal. Mar. 6, 2009). But these foreign-investor plaintiffs do not and cannot allege that they ever relied on any of that domestic conduct when they traded securities on foreign exchanges—let alone that they directly relied on the significant, material domestic conduct that this Court should at a minimum require. Congress could not have intended that foreign investors in the securities of a German company on the Frankfurt Stock Exchange, none of whom have any connection to the scant and immaterial United States conduct they allege, would be able to proceed with a securities class action in United States courts under Section 10(b).

B. Private Securities Fraud Actions Are Often Incompatible With The Laws Of Other Nations

The United States is not alone in its desire to prevent securities fraud. Other nations also have a strong interest in protecting their capital markets and investors.[3] But, as this Court has explained,

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[3] For example, in amicus' home country, Section 38 of the German Securities Trading Act, *Wertpapierhandelsgesetz* ("WpHG") [Securities Trading Act], Sept. 9, 1998, *Bundesgesetzblatt, Teil* I ("BGBl. I") 3198 (F.R.G.), punishes insider trading and securities fraud with between one and five years in prison.

"'[f]oreign conduct is [generally] the domain of foreign law,'" *Microsoft*, 550 U.S. at 455 (second brackets in original), and different nations can and have adopted different means of preventing securities fraud. *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 61 (2007) ("Although the central concerns addressed by anti-fraud rules may be the same across systems, many differences remain in both specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries.") (internal footnote omitted).

Judicial restraint on the extraterritorial application of Section 10(b) to claims by foreign investors is also warranted due to the manner in which such actions actually conflict with foreign law. As this Court has held, if United States "policies could not win their own way in the international marketplace for such ideas, Congress * * * would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169. Indeed, this is particularly true with respect to massive securities fraud class actions in which plaintiffs—purporting to represent thousands of absent foreign investors who are citizens of other nations—often claim billions of dollars in damages from other nations' largest corporations.

1. Unlike the United States, many other nations do not encourage or permit private enforcement of their securities laws. Germany's securities regulatory

framework—which governs amicus's conduct—successfully emphasizes government enforcement over private litigation. To help further that deliberate policy choice, the German Code of Civil Procedures, *Zivilprozessordnung* ("ZPO") § 32b, establishes exclusive German court jurisdiction over private lawsuits against German issuers seeking compensation for misstatements in public disclosures. Indeed, United States private securities fraud actions contain many elements that are incompatible with German law, such as contingent fee arrangements, as opposed to Germany's "loser pay" fee-shifting provisions. Thus, "[i]t was the express aim of the German legislation to protect German corporations from undue forum shopping by plaintiffs in the United States and to channel capital market disputes involving German defendants to domestic courts." Moritz Bälz & Feliz Blobel, *Collective Litigation German Style: The Act on Model Proceedings in Capital Market Disputes*, *in* Conflict of Laws in a Globalized World 126, 144 (Eckart Gottschalk et al. eds., 2007).

Germany is not alone in its hostility to certain aspects of United States private securities fraud actions. Buxbaum, *supra*, at 61-64 (noting the aspects of United States securities fraud actions that are often incompatible with the laws of other nations).

2. One particularly acute example of this conflict between the laws of the United States and those of other nations is the availability of class actions.

Unlike other nations, courts in the United States entertain broad class actions that bind absent class members who do not affirmatively opt out. The due process concerns of defendants in such actions are minimized because of the potential for claim preclusion against absent class members if the defendant prevails. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). But as commentators have recognized, not all nations recognize or will enforce a United States class action judgment. *See, e.g.*, Buxbaum, *supra*, at 61; Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 Mich. St. L. Rev. 619, 624-625 (2004) ("In particular, the class action device is unique; most foreign nations do not have a similar procedure.").

Amicus and other German companies face this dilemma in every United States securities class action by unnamed foreign investors filed against them, because German courts, in particular, will neither recognize any judgment that purports to adjudicate the claims of absent class members nor enforce any such judgment. Bälz & Blobel, *supra*, at 129-131; Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions & the* Acquis Communautaire, 15 J. Transnat'l L. & Pol'y 281, 297 (2005-2006) (noting that German law "can be seen as an express rejection of U.S.-style class action mechanism by the *Bundesregierung* (German Federal Government) and the *Bundestag* (German Federal Parliament)"). For example, Germany

does not permit opt-out class actions, as German law requires a plaintiff to affirmatively submit to the court's jurisdiction. *See* ZPO § 39. And, unlike the United States, German law requires that parties receive actual notice of a United States class action for a judgment to be recognized. Buxbaum, *supra*, at 62 ("Most foreign legal systems do not permit group litigation, and even those that have adopted some form of collective action mechanism do not recognize the validity of opt-out procedures.").

Because many other nations will not give preclusive effect to favorable class action judgments obtained by defendants in the United States, private securities fraud class actions by foreign investors deprive defendants of the only real benefit of class certification: a single action to bind all class members.

Accordingly, the laws of other nations are often incompatible with private securities fraud class actions, and some nations, such as Germany, have expressly sought to limit the use of such devices to vindicate securities fraud that is perpetrated on their markets and against their residents. But under reasoning used by several courts of appeals, foreign investors are permitted to maintain such actions even though any adverse judgment from such an action would not be recognized abroad and thus would not bind absent foreign-investor class members. Such a result creates "unintended clashes between our laws and those of other nations which would result in international discord." *EEOC*, 499 U.S. at 248. That

is precisely what this Court's presumption against the extraterritorial application of United States law is meant to prevent. Indeed, "other countries may not view the United States as a 'good neighbor' when a billion-dollar class action settlement threatens the solvency of one of their major corporations." John C. Coffee, Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, 240 N.Y.L.J. 5, 6 (2008).

C. The Extraterritorial Expansion Of Private Securities Fraud Class Actions Will Discourage Foreign Participation In United States Capital Markets

Not only do securities fraud actions by foreign investors in foreign companies on foreign exchanges create the possibility of international discord, but also threaten United States capital markets.

1. This Court has recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)). "Even weak cases * * * may have substantial settlement value * * * because '[t]he very pendency of the lawsuit may frustrate or delay normal business activity.'" *Ibid.* (quoting *Blue Chip Stamps*, 421 U.S. at 740). Indeed, this Court has warned that such actions "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs,*

Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

Moreover, once a securities case survives a motion to dismiss, the potential for the plaintiff to abuse the liberal discovery process is much greater than in other types of litigation. *See Blue Chip Stamps*, 421 U.S. at 741. As a result, it is often more economical for a defendant to settle than to incur costs associated with discovery, even when it is likely that the defendant will ultimately prevail at summary judgment or at trial.

But the direct costs (*i.e.*, legal fees) associated with abusive discovery are only one aspect of the wider problem. Depositions and other extensive discovery often draw the attention of key employees away from the business's day-to-day operations and its long-term strategies. *See* H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Where a securities action that cannot succeed proceeds beyond dismissal, "it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," and it exacts "a social cost rather than [providing] a benefit." *Blue Chip Stamps*, 421 U.S. at 741.

2. Like this Court, amicus and other foreign corporations are aware of these dangers associated with United States securities fraud class actions. And amicus agrees with this Court's observation in *Stoneridge* that overseas firms with otherwise "no other

exposure to our securities laws could be deterred from doing business here." *Stoneridge*, 552 U.S. at 164. The legal costs and judgment values of securities fraud class actions are factors that must be weighed by foreign companies deciding whether to list their securities on the United States capital markets. *Ibid.* (noting that these types of actions "may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets").

These risks are particularly acute because plaintiffs often contend that a foreign issuer's decision to list its securities on the New York Stock Exchange (NYSE) automatically grants *all the company's shareholders*, no matter where they purchased their securities, the right to bring claims in United States courts. These plaintiffs sometimes claim that the act of filing financial reports with the SEC is sufficient conduct to grant foreign investors on foreign exchanges the right to sue in the United States.

Last year, amicus voluntarily delisted from the New York Stock Exchange. Amicus explained that after "weigh[ing] the benefits of listing on the NYSE against the associated costs" it "reached the decision that continuing the listing * * * [wa]s no longer commercially justifiable." Press Release, Infineon Techs., *Infineon voluntary delists from New York Stock Exchange* (Apr. 3, 2009), *available at* http://tinyurl.com/ifxdelist (last visited Feb. 24, 2010). Amicus is not alone, as other foreign issuers have also delisted from the NYSE. In November 2009, Fairfax Financial

Holdings Limited voluntarily delisted from the NYSE, so its shares would be traded only on the Toronto Stock Exchange. *See* Press Release, Fairfax Fin. Holding Ltd., *Fairfax Voluntarily Delisting from NYSE* (Nov. 19, 2009), *available at* http://tinyurl.com/fairfaxdelist (last visited Feb. 24, 2010). Likewise, in December 2007, SCOR Holding (Switzerland) Ltd. voluntarily delisted from the NYSE, so its shares would be traded only on the Euronext Paris. *See* Press Release, SCOR SE, *SCOR announces intention of SCOR Holding (Switzerland) Ltd. to delist American Depositary Shares and to deregister in the US* (Dec. 14, 2007), *available at* http://tinyurl.com/scordelist (last visited Feb. 24, 2010). Before delisting, both Fairfax and SCOR Holding had been sued in securities class actions involving foreign investors who purchased their securities on foreign stock exchanges. *See, e.g., In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556 (S.D.N.Y. 2008); *Parks v. Fairfax Fin. Holdings, Ltd.*, No. 1:06cv2820 (S.D.N.Y. filed Apr. 11, 2006). And, with the number of securities fraud class actions involving foreign investors proliferating, *see* Cornerstone Research, *Securities Class Action Filings, 2009: A Year in Review* at 11, *available at* http://tinyurl.com/cornerstonersch (last visited Feb. 24, 2010) (demonstrating that the number of securities class actions against foreign issuers has doubled in aggregate number *and* as a percentage of all class actions over the past decade), more companies that are dually listed (or are considering becoming dually listed) on United States and foreign exchanges will

need to decide if their presence in the United States capital markets is worth the cost.

In amicus's view, based on its own experience, many will decide that the costs outweigh the benefits. As discussed above, securities fraud class actions are frequent, unpredictable, and costly. The average public company in the United States has nearly a 10 percent probability of facing at least one securities class action in any five-year period. Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* 74 (2006) ("Interim Report"). And on average, securities class actions reduce the defendant company's equity value by 3.5 percent. Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005), *available at* http://tinyurl.com/ydxk4lz (last visited Feb. 24, 2010).

Moreover, a survey of more than 350 senior executives in the financial services sector revealed that "a fair and predictable legal environment was the second most important criterion determining a financial center's competitiveness." Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's & the US' Global Financial Services Leadership* 16 (2007) ("Bloomberg-Schumer Report"), *available at* http://tinyurl.com/nyfinalrpt (last visited Feb. 24, 2010). But the prevalence of securities class-action litigation and settlements contributed to the belief that "the US legal environment is less fair and less

predictable than the UK environment." *Ibid.*[4] Here, the unpredictability of United States law is underscored by the ad hoc formulation adopted by many courts of appeals, under which "the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive." *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979). And its unfairness is demonstrated by the fact that foreign-investor plaintiffs often get a free shot at the defendant because any adverse class action judgment against the plaintiffs will not bind absent class members in many of their home nations. *See* pp. 17-20 *supra*.

Empirical evidence supports the widespread perception that the enormous litigation costs of United States securities fraud class actions and the lack of predictability in the United States legal system are harming the economy. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings—so-called global IPOs." Interim Report at 29. The United States market share of global IPOs has been rapidly

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[4] Only about 15 percent of survey respondents preferred the United States legal system, while more than 40 percent perceived the U.K. legal system as outperforming the United States in terms of predictability and fairness. Bloomberg-Schumer Report at 77.

declining throughout this decade. In 2000, approximately 50 percent of the funds raised through global IPOs was raised in the United States, but by 2005 that figure had steadily dropped to just 5 percent. *Id.* at 29-30. The trend continued in 2006, in which 9 of the 10 largest IPOs occurred outside the United States, and the United States' share of global IPO funds remained less than 10 percent. *Id.* at 30. And the phenomenon is not isolated to foreign companies; domestic companies have begun to "abandon[] the U.S. equity markets to list in London," where it is much less expensive to raise capital. *Id.* at 32. This drop in the domestic market share, unfortunately, is not the result of cyclical behavior but a symptom of declining competitiveness, *ibid.*, triggered in no small part by the burden of securities litigation in the United States.

While the public equity markets in the United States are in decline, the *private* equity market—where companies are shielded from most securities liability—has become the "market of choice," for foreign companies wishing to raise capital in the United States, even though the cost of doing so is more expensive. *Id.* at 45-46. The "regulatory and litigation burden is an important factor" driving the companies into the private market. *Id.* at 46. Because, "[g]enerally, only institutions and wealthy individuals can participate directly" in the private equity market, individual investors are losing opportunities to invest in these companies. *Id.* at 34. Consequently, "the average investor [is left] in increasingly less

liquid and more expensive markets than those enjoyed by institutions and the wealthy." *Ibid.*

Amicus and many other foreign public companies understand that the United States has, as a matter of its own domestic policy, decided to permit the private enforcement of the securities fraud laws through the class action device. Foreign public companies are often willing to accept the possibility of such actions by United States investors when they list their securities on the NYSE. But costs associated with defending global class actions by foreign investors who have no connection with the United States often vastly exceeds the value of such listings, and, if left unabated by this Court, will discourage foreign participation in the United States capital markets.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, *et al.*,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE THE INSTITUTE OF INTERNATIONAL BANKERS, THE EUROPEAN BANKING FEDERATION, AND THE AUSTRALIAN BANKERS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 08-1191

ROBERT MORRISON, *et al.*,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICI CURIAE THE INSTITUTE OF INTERNATIONAL BANKERS, THE EUROPEAN BANKING FEDERATION, AND THE AUSTRALIAN BANKERS' ASSOCIATION IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE[1]

Founded in 1966, the Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests

[1] No counsel for a party authored this brief in whole or in part, and no persons or entities, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

of the international banking community within the United States. IIB's members include 99 internationally headquartered financial institutions, from 39 countries around the world. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates and other operations of IIB's member banks are an important source of credit for U.S. borrowers and enhance the depth and liquidity of U.S. financial markets.

One of IIB's goals is to ensure that the global operations of its member banks are not impeded by the unjustified extraterritorial application of U.S. laws, including its securities laws. These laws may conflict or be in tension with the laws or regulations of the home countries of IIB's member banks. In addition, IIB members have a strong interest in continuing to do business in the U.S., and in encouraging their non-U.S. clients to expand their cross-border business in the U.S. To the extent that the U.S. legal framework is viewed as drawing what are essentially home-country disputes into U.S. courts, the interests of IIB members will be adversely affected. The question posed by this case is, therefore, of great significance to IIB and its members.

Founded in 1960, the European Banking Federation ("EBF") is the voice of the European banking sector. The EBF represents the national banking associations of 31 European Union and European Free Trade Association countries, totaling some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. Tracing its history back to the late 1940s, the Australian Bankers' Association ("ABA") represents the majority of the licensed wholesale and retail banks in Australia. The EBF and the ABA share IIB's goals as they relate to this case.

SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 does not provide a private cause of action against a foreign issuer in connection with purchases or sales of its securities in a foreign market. Nothing in the language of Section 10(b), or its legislative history, suggests that Congress intended to create such a cause of action. And two independent and venerable statutory rules of construction—the general presumption against extraterritoriality, and the specific presumption that Congress legislates consistent with prescriptive comity—counsel against expanding the judicially implied private cause of action to reach this context. *See infra* Part I.

The presumption of comity should have particular force here, because other nations have made very different policy choices from the United States in regulating their securities markets. These include: what conduct to prohibit, the extent to which private parties may bring suits for violations of the securities laws or whether enforcement of these laws is left to public entities, and what procedural rules should govern private suits. Allowing private plaintiffs to bring a global class action against a foreign issuer arising from purchases or sales of securities in its home market threatens to override those policy choices. *See infra* Part II.

For the same reason, whatever the Court's substantive holding as to the extraterritorial reach, if any, of Section 10(b), it is imperative that the Court adopt a bright-line test that enables district courts to adjudicate and the parties to know, at the outset, which private plaintiffs have stated a cause of action and which have not. The rule advocated here, under which a plaintiff who purchased or sold the securities of a for-

eign issuer in a foreign market would not have a private right of action, is such a rule. Absent a bright-line rule, foreign issuers may be subjected to the burdens and uncertainty of intensive U.S. discovery, pre-trial litigation, and perhaps even trial, before the question of extraterritoriality is resolved. By that point, much harm to the issuer, and thereby to its home country's regulatory policy choices, will have been done. *See infra* Part III.

ARGUMENT

I. SECTION 10(b) DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST A FOREIGN ISSUER WITH RESPECT TO TRANSACTIONS IN ITS SECURITIES IN FOREIGN MARKETS

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder bar deception in connection with the purchase or sale of securities. Beginning in 1946, the courts "implied" a private cause of action under these provisions against issuers who have made materially false disclosures. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Much of this case law was born under the philosophy that federal courts could create causes of action to serve the perceived objectives of a federal statute. *See, e.g., J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *see generally* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). More recent decisions of this Court, however, have made it clear that a cause of action should be "implied" only where Congress itself intended to create one.

This Court has never extended the implied private cause of action under Rule 10b-5 to cover the purchase or sale of securities of a foreign issuer in a foreign mar-

ket. Nothing suggests that Congress intended to regulate wholly foreign transactions. On the contrary, the traditional indicia of congressional intent point the other way. Neither the text of the Exchange Act nor its legislative history contains any evidence that Congress intended Section 10(b) to protect U.S. or foreign persons who enter foreign markets to buy or sell the securities of an issuer whose disclosure obligations are prescribed by the laws of its own country.[2] And two well-established presumptions—the presumption against extraterritoriality and the presumption that Congress legislates consistent with prescriptive comity—weigh against implying a cause of action in these circumstances.[3]

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[2] A foreign issuer whose securities trade overseas but that also allows its securities to trade in American Depositary Receipt ("ADR") form subjects itself to certain specified U.S. disclosure obligations. Importantly, though, these obligations do not match those of U.S. issuers, *see, e.g.*, 17 C.F.R. § 240.13a-11(b), and the mere fact of ADR trading in the U.S. does not alter the foreign issuer's obligations to persons who trade its securities (not ADRs) in its home market. The fact of ADR trading thus adds nothing to a claim brought by persons who purchased a foreign security on a foreign market, as lower courts have uniformly recognized. *See, e.g.*, *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527, 541 (S.D.N.Y. 2007); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005). Put differently, purchasers of a foreign issuer's securities in a foreign market may not piggyback on the fact of ADR purchases by other persons as a basis for bringing suit against the issuer in the United States. *Cf. IIT* v. *Vencap*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975) (Friendly, J.) (warning of risk that "a very small tail may be wagging an elephant"). Petitioners do not argue otherwise.

[3] Amici respectfully suggest that the court of appeals also concluded, in essence, that Congress did not intend to provide a private cause of action under the facts as alleged. That court's use

That some of the alleged facts on which a claim is based relate to business activities of a foreign issuer's U.S. subsidiary is irrelevant. The foreign parent's disclosure responsibilities are established by foreign law, as are the remedies available to purchasers and sellers who go into foreign markets to purchase or sell the parent's securities.

This brief focuses on the facts that (1) respondent National Australia Bank Ltd. ("NAB") is a foreign issuer and (2) petitioners and the putative plaintiff class all traded in NAB's securities in foreign markets. Amici argue that, in this "foreign-squared" situation, Section 10(b) and Rule 10b-5 do not provide a cause of action against respondents. But this case also involves a third foreign factor: Petitioners and putative class members are not themselves U.S. persons, whom Congress was of course principally concerned to protect. If the Court elects not to rule with respect to the "foreign-squared" context, it should, at a minimum, hold that there is no cause of action in a "foreign-cubed" case—where the issuer, the relevant markets, and the plaintiffs are all foreign. *A fortiori,* the arguments in this brief as to why Section 10(b) does not supply a cause of action in the "foreign-squared" context apply with even greater force to the "foreign-cubed" context.

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of the word "jurisdiction," while longstanding in this area, confusingly suggests that the issue has to do with the power of the court, rather than whether Congress authorized the cause of action being asserted. *See* pp. 12-13, *infra* (noting that Second Circuit's "conduct" and "effects" tests arose from mistaken view that the extraterritoriality question was jurisdictional).

A. The Existence Of An Implied Private Cause of Action Depends On Whether Congress Intended To Create One

1. The private cause of action under Section 10(b) was created at a time when courts believed they should create causes of action to help enforce general federal policies

Section 10(b) of the Exchange Act does not expressly provide for any private right of action. 15 U.S.C. § 78j; *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). Rather, the cause of action is a judicial construct under an "*ancien regime*" in which federal courts felt a duty to create rights to effectuate Congress's perceived purposes. *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001); *see generally* Friendly, 39 N.Y.U. L. Rev. 383. Proceeding under this notion, courts liberally implied private rights of action under a variety of statutes, including the Exchange Act. *See, e.g., J.I. Case Co.*, 377 U.S. 426 (holding a corporate shareholder could sue for damages under section 14(a) of the Exchange Act because private enforcement was necessary to supplement the statutory scheme); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (impliedly recognizing a private right of action based on Section 29(b) of the Exchange Act).

First recognized by a federal district court in 1946, the Section 10(b) cause of action was accepted by this Court 25 years later with virtually no discussion. *Kardon*, 69 F. Supp. 512; *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). Thirty-five years ago this Court described this private right of action as a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

2. The Court has since clarified that causes of action are to be "implied" only where Congress intended them, and the Court has applied this principle to reject attempts to extend Section 10(b) beyond its current boundaries

The expansive view of the judiciary's power to create causes of action has long been discredited. It is now "settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." *Stoneridge Inv. Partners*, 552 U.S. at 164. The "ultimate question" in determining whether an implied cause of action exists is "one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979); *see also Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979). "Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress.*" *Sandoval*, 532 U.S. at 286 (emphasis added).

Of particular relevance here, this Court has repeatedly refused to *expand* the implied private rights of action under the Exchange Act without proof of congressional intent to provide the claim at issue. *See, e.g.*, *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (tender-offer bidders do not have a private right of action under Section 14(e)); *Touche Ross*, 442 U.S. 560 (there is no private right of action under Section 17(a)); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (there is no private right of action under Section 10(b) for aiding and abetting); *Stoneridge Inv. Partners*, 552 U.S. 148 (similar).

Although the Court has continued to enforce the Section 10(b) private cause of action, it has "made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991); *see also Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy" (internal footnotes omitted)). In *Stoneridge Investment Partners*, this Court advised that the reach of the 10(b) private right of action should not be further expanded without congressional action:

> Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.

552 U.S. at 165.

B. Nothing In Section 10(b) Or Its Legislative History Suggests An Intent To Create A Private Cause Of Action For Plaintiffs Who Purchase Or Sell The Securities Of A Foreign Issuer In A Foreign Market

There is no evidence that Congress intended to create a private right of action for plaintiffs who purchase or sell foreign securities abroad. Not only is the text of Section 10(b) silent as to the very existence of a private right of action, it does not by its terms apply extraterritorially. *See* 15 U.S.C. § 78j. A reading of the statute as a whole, combined with the limited legislative history, suggests that in enacting Section 10(b), Congress was primarily concerned with regulating domestic markets and protecting domestic interests. *See*

id. § 78(b); *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (citing H.R. Rep. No. 73-1383, at 1-16 (1934); S. Rep. No. 73-792, at 1-13 (1934)); *see also Robinson* v. *TCI/US W. Commc'ns*, 117 F.3d 900, 907 (5th Cir. 1997).

Section 30 of the Exchange Act, which explicitly addresses transactions in U.S. securities on foreign exchanges, is further evidence that Congress did not intend Section 10(b) to have general extraterritorial application. 15 U.S.C. § 78dd. In Section 30(a), Congress specified that the Exchange Act is applicable to brokers and dealers only in so far as they trade securities of *U.S.* companies on foreign exchanges. *Id.* § 78dd(a). This provision addressed Congress' concern that brokers and dealers might evade the Act, with respect to transactions in U.S. securities that are properly governed by U.S. law, by executing their transactions over foreign exchanges. *See Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 207 (citing *Hearings on S. Res. 89 (72d Cong.) and S. Res. 56 and S. Res 97 (73d Cong.) Before the S. Comm. on Banking and Currency*, 73d Cong., pt. 15, 6569, 6578-6579 (1934)), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc). The clear premise was that, without a congressional directive to the contrary, even transactions by U.S. broker-dealers in U.S. securities might be beyond the Exchange Act's reach if they were executed in a foreign market.

Congress confirmed that premise by stating in Section 30(b) that the section applied only to cases covered by SEC rules adopted "to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). The clear implication is that the entire "chapter" ordinarily reaches only domestic transactions; trading on foreign exchanges—even of U.S.-related securities—is covered only to prevent "evasion" of U.S. rules. *Id.*; *see also Schoenbaum*,

405 F.2d at 207 (Section 30(b) is "designed to take the Commission out of the business of regulating foreign security exchanges unless the Commission deems regulation necessary to prevent evasion of the domestic regulatory scheme."); *Zoelsch*, 824 F.2d at 32 ("That rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets."). Notably, the SEC has not used its rulemaking authority to implement this provision.[4]

Additionally, recent scholarship analyzing the legislative history of the Securities Act of 1933 and the Exchange Act suggests that Congress specifically considered and rejected application of Section 10(b) to disclosures by foreign issuers in connection with purchases and sales of securities in their home markets. *See* Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 691-708 (1990) (dispelling myth that Congress could not foresee the internationalization of markets and pointing to evidence in legislative history of the 1933 Act suggesting that Congress intentionally decided not to regulate foreign transactions); *see also*

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[4] Section 30 is of course not remotely applicable here. NAB is not a resident of or organized under the laws of any U.S. jurisdiction, nor does it have its principal place of business here. But more fundamentally, any "evasion" is entirely on the other side. There is no sense in which this Australian bank or anyone else was somehow "using" facilities in Australia to escape the laws of the United States. On the contrary, it is petitioners who appear to be attempting to use U.S. law to evade Australian procedures in a suit that obviously belongs in an Australian court. Of course, if a foreign issuer uses the securities trading facilities of this country to perpetrate a fraud, there is a U.S. regulatory interest, but that is not this case.

Reuveni, *Extraterritoriality as Standing: a Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. Davis L. Rev. ___, manuscript at 45-48 (forthcoming Apr. 2010) (similar), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496049.

Courts that have nevertheless expanded the Section 10(b) private right of action to reach foreign transactions have acknowledged that they were making policy decisions independent of Congress. *See, e.g., Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (Friendly, J.) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond."); *Continental Grain* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."). Such policy decisions are for Congress to make.

Similarly, reliance on the "conduct" and "effects" tests to govern the extraterritoriality inquiry is misplaced. The Second Circuit contrived these tests over 40 years ago using a jurisdictional analysis. *See, e.g., Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (Friendly, J.); *Schoenbaum*, 405 F.2d at 206-209. The relevant inquiry, however, does not concern the power of the court but whether Congress authorized the cause of action. Indeed, Judge Friendly, who first articulated the "conduct" test, recognized in his final opinion on the subject that "[i]f this issue were arising here for the first time," the court might not analyze it as one of subject-matter jurisdiction. *AVC Nederland B.V.* v. *Atrium Inv. P'ship*, 740 F.2d 148, 153 (2d Cir. 1984). In the absence of congres-

sional intent to create a private right of action against a foreign issuer with respect to transactions in foreign markets, this Court should follow *Stoneridge Investment Partners* and leave it to Congress to expand the Section 10(b) private right of action beyond its present boundaries. *Stoneridge Inv. Partners*, 552 U.S. at 165.

C. Two Presumptions—A General Presumption Against Extraterritorial Effects And A Specific Presumption Of Comity—Counsel Against Extending the Section 10(b) Right Of Action To Transactions In Foreign Securities In Foreign Markets

1. Congress is presumed not to intend to regulate extraterritorially

This Court has observed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption recognizes that Congress is "primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. Accordingly, this Court has been unwilling to extend the reach of federal laws beyond the territorial boundaries of the United States absent an "affirmative intention of the Congress clearly expressed." *Aramco*, 499 U.S. at 248 (boilerplate language extending Title VII's prohibitions to "any activity, business, or industry in commerce" is insufficient to overcome the presumption against extraterritoriality).

So strong is the presumption that it "is not defeated" even where "'a statute specifically addresses [an] issue of extraterritorial application.'" *Microsoft*

Corp. v. *AT&T Corp.*, 550 U.S. 437, 455 (2007) (quoting *Smith* v. *United States*, 507 U.S. 197, 204 (1993) (alterations incorporated)). The presumption "remains instructive in determining the extent of the statutory exception." *Id.* In *Microsoft Corp.*, the Court rejected the argument that the presumption against extraterritoriality was inapplicable where Congress had enacted a provision to extend U.S. patent law to certain activity abroad. Recognizing that extraterritorial application is the exception, this Court interpreted the provision narrowly and concluded that foreign law, not U.S. law, governed the manufacture and sale of components of inventions in foreign countries. 550 U.S. at 442, 456.

The presumption that "United States law governs domestically but does not rule the world," 550 U.S. at 454, applies equally to Section 10(b) of the Exchange Act. As discussed *supra*, Section 30 extends the statute to certain transactions on foreign exchanges that could otherwise be used to evade U.S. law, but its application is carefully limited to transactions in U.S. securities where there has been a violation of an SEC rule adopted to prevent evasion, which is plainly not the case here.

2. Congress is also presumed to take into account the proper interests of foreign nations

A second important canon of construction is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*,

542 U.S. 155, 164 (2004); *see also Microsoft Corp.*, 550 U.S. at 455 (same); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting) (describing "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws"). Accordingly, this Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164 (application of Sherman Act to foreign conduct); *see also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (same).

This rule of construction, which is "wholly independent" of the presumption against extraterritoriality, *Aramco*, 499 U.S. at 264; *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting), "reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow," *Empagran*, 542 U.S. at 164 (citing *Restatement (Third) of Foreign Relations Law* ("*Restatement*") §§ 403(1), 403(2) (1986)).

In *Empagran*, the Court considered whether foreign plaintiffs could bring claims under the Sherman Act to recover damages caused by "anticompetitive price fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury." The plaintiffs were able to point to a specific provision of the Foreign Trade Antitrust Improvements Act ("FTAIA") that authorized extraterritorial reach in certain circumstances. Specifically, the FTAIA placed "within the Sherman Act's reach" foreign conduct that "has a 'direct, substantial and reasonably foreseeable effect'" on American commerce. 542 U.S. at 162 (quot-

ing 15 U.S.C. § 6(a)(1), (2)). Nevertheless, in light of the evidence that Congress intended the Sherman Act to reach only foreign conduct that causes domestic injury and the presumption that Congress takes into account the interests of other nations, this Court concluded that it would not be "reasonable to apply [the Sherman Act] to ... significantly foreign" conduct that "causes independent foreign harm [which] alone gives rise to the plaintiff's claim." *Id.* at 164, 166.

Because applying U.S. laws abroad "creates a serious risk of interference with a foreign nation's ability to regulate its own commercial affairs," there must be a strong justification for doing so. 542 U.S. at 165.[5] The Court has noted that whether the extraterritorial application of American law is reasonable depends on a variety of factors such as connections with the regulating nation, harm to that nation's interests, the extent to which other nations regulate the activity at issue, and the potential for conflict. *Id.* (citing *Restatement* § 403(2)).

Other nations have a strong interest in regulating disclosures by their own issuers. This interest extends not only to the nature, content, and timing of disclosures, but also to litigation related to disclosures, including the availability of class actions, contingent fees,

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[5] Commentators have suggested that Section 30(b), discussed *supra*, functions as a "built-in prescriptive comity mechanism" by placing the responsibility for determining the application of U.S. law to certain foreign transactions in the hands of the SEC. Reuveni, 43 U.C. Davis L. Rev. ___, manuscript at 48; Sachs, 28 Colum. J. Transnat'l L. at 698 (Section 30(b) was intended as an "olive branch signaling an intention not to interfere with foreign securities activities.").

and other procedures. *See* Part II, *infra*. Where, as here, the plaintiffs have chosen to trade in a foreign security in a foreign market, "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from [] conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Empagran*, 542 U.S. at 165.

A rule that Section 10(b) does not provide a cause of action against foreign issuers for disclosures governed by the laws of their own countries in connection with the purchase or sale of their securities in their own countries accords with the presumption that United States law governs domestically and respects the rights of other nations to make different decisions about how to regulate securities disclosures and prevent fraud in their own markets. Such a bright line rule would also be easily administrable and "is likely to comport with most investors' a priori views on when the U.S. laws apply." Choi & Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 500 (2009).

II. THE EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS RISKS INTERFERING WITH OTHER NATIONS' POLICY DECISIONS IN THIS HEAVILY REGULATED AREA

As this Court recognized in *Empagran*, the extraterritorial application of U.S. statutes risks "interfere[ing] with the sovereign authority of other nations." 542 U.S. at 164. That risk is strongly present here.

There is no self-evidently optimal approach to the regulation of securities markets. Regulation of such markets and their participants necessarily entails pol-

icy judgment and the balancing of different concerns. These policy questions are a matter of great debate in other nations.[6] Not surprisingly, other nations have answered the questions in ways markedly different from the United States.

Specifically, while "governments ... are generally in agreement that fraud should be discouraged" (Pet. Br. 35 (internal quotation marks omitted)), different nations have reached different conclusions about what constitutes fraud and how to deter and prosecute it.[7]

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[6] *E.g.*, Loke, *The Efficacy of Securities Investors' Rights in Singapore*, 2009 Sing. J. Legal Stud. 109 (2009); Condon, *Rethinking Enforcement and Litigation in Ontario Securities Regulation*, 32 Queen's L.J. 1 (2006); Wang, *Dancing with Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market*, 5 Asian-Pac. L. & Pol'y J. 1 (2004).

[7] Petitioners' own authorities (Br. 35-36) make this very point, though petitioners obscure that fact. According to petitioners, the *Restatement (Third) of Foreign Relations Law* (1987) ("*Restatement*") states: "'[N]o instance is known in which a transaction challenged under United States law—such as misrepresentation or insider trading—was asserted to be mandated or encouraged by the law of a foreign state.'" Br. 36 (quoting *Restatement* § 416, Reporters' Notes No. 3) (petitioners' alteration). By use of strategically placed brackets, petitioners suppress the first part of the sentence: "Many states define prohibited conduct with respect to securities differently from the United States[.]" *Restatement* § 416, Reporters' Notes No. 3.

Petitioners also rely (Br. 36) upon the statement that "the area of securities regulation has simply not generated the same level of difficulty and hostility as extraterritorial regulation in other areas." Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62 (2007). But petitioners leave out the author's immediately ensuing conclusion: "I believe this is going to change .... Although foreign claimants have long had the ability to

Extraterritorial application of U.S. securities law necessarily risks interfering with the authority of other sovereign nations to make these policy choices.

For example, a basic question is how much information a corporation must publicly disclose. A nation must strike a "balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 n.10 (1976); *see also id.* at 448 (absent some limitation, "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information").

In the United States, the balance is struck by "the standard of materiality," with disclosure generally required where there is "a substantial likelihood that the disclosure of the omitted fact would [be] viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus.*, 426 U.S. at 449; *see also Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988); 17 C.F.R. § 240.12b-2 ("The term 'material,' when used to qualify a requirement for the furnishing of information ... , limits the information re-

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seek inclusion in U.S. class actions, they have been exploiting that opportunity more frequently in recent years." *Id.* Petitioners also ignore the discussion preceding the sentence they tout. *Id.* at 61 ("Although the central concerns addressed by anti-fraud rules may be the same across systems, many differences remain both in specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries." (citation omitted)).

quired to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.").

To the extent that other nations have even developed similar concepts, they have not all agreed upon this definition. In China, for example, disclosure of new information that arises in between routine reports is required where the company experiences a "major event that may *considerably affect the trading price.*" Securities Law of the People's Republic of China, art. 67 (2005) (emphasis added), *in International Securities Regulation* (Rosen et al. eds., Dec. 2007). In India, securities law also defines materiality distinctly: Indian law mandates disclosure in between routine reports of new "price sensitive" information, defined as "any information which relates directly or indirectly to a company and which if published is *likely to materially affect the price*" of a company's security. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, § 2(ha), Schedule II, at 2.1 (2009) (emphasis added).[8]

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[8] Similarly, in both China and India, a false statement or omission is actionable only when it reaches this stricter definition of materiality. *See* Supreme People's Court, *Trial of Civil Damages Cases Arising from Misrepresentation in the Securities Market Several Provisions*, art. 17 (Jan. 9, 2003) (P.R.C.) ("false statement" or "major omission" not actionable unless the statement or omission pertains to "important information," defined as a "major event that may considerably affect the trading price"), *available at* http://www.chinalawandpractice.com/Article/1693266/Search/Trial-of-Civil-Damages-Cases-Arising-from-Misrepresentation-in-the.html?Keywords=%22Trial+of+Civil+Damages+Cases+Arising+from+Misrepresentation%22 (unofficial translation); Zhu, *Securities Dispute Resolution in China* 163 (2007); Securities and Exchange

A related point of difference concerns the definition of materiality in insider trading cases, which, within the United States, may be brought under Section 10(b).[9] The differing definitions of materiality for these purposes result in substantially different liability regimes. In Spain, for example, the securities laws distinguish between material information for purposes of insider trading and material information for purposes of non-routine disclosure. *Compare* Spanish Securities Market Law, art. 81(1) (2007), *with id.* art. 82(1), http://www.cnmv.es/index_n_e.htm?english/Legislacion/Legislacion/indi_general_e.htm~/english/p_legislacion__1_e.html (unofficial translation). Under Spanish law, insiders are prohibited from trading on the basis of information "likely to have a significant effect on the price[]" of the security. *Id.* art. 81(1); *see also* Securities Law of the People's Republic of China, art. 75 (2005) (insider trading prohibited on the basis of information that "may have a major effect on the market price" of the security), *in International Securities Regulation* (Rosen et al. eds., Dec. 2007); Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, §§ 2(ha), 3 (2009) (applying "price sensitive" standard of materiality to insider trading). Other countries have chosen not to prohibit insider trading at all. *See* Bhattacharya & Daouk, *The World Price of Insider Trading*, 57 J. Fin. 75, 77-78 (2002)

Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2(c)(9) (2009) ("misinformation" is not sufficient, because the information must also "affect[] the market price of the security").

[9] *See, e.g., United States* v. *O'Hagan*, 521 U.S. 642, 649-652 (1997).

(listing 15 countries that do not have insider trading laws).[10]

Further, "even where nations agree about primary conduct, ... they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 167 (speaking in the antitrust context). That is particularly true in the securities area, where "[r]egulations impose substantial additional costs beyond those borne directly by regulated parties," including "disrupt[ion of] some number of transactions that would have been socially desirable." Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 Yale J. Reg. 253, 261 (2007).

An additional, critical question for each nation is *who* should enforce its securities laws—and therefore who decides what alleged misconduct triggers potential liability. This, too, entails weighing the benefits and costs of alternative approaches. *See, e.g., Stoneridge*, 552 U.S. at 164 (describing certain "risks" of private enforcement); *see generally* Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007). A nation might choose purely public enforcement of securities laws (with civil penalties, criminal penalties, or both); purely private enforcement; or

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[10] Section 10(b) prohibits not only "fraud" but also "manipulat[ion]," a concept as to which countries have taken diverging approaches. *See, e.g.*, Carroll, *Market Manipulation: An International Comparison*, 9 J. Fin. Crime 300, 304 (2002) (describing differences between the U.S., U.K., and Germany); *see also* Fischel & Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503, 512-529 (1991).

some combination.[11] China, for example, has determined that private actions should be allowed only when they are predicated on findings made in the course of a public enforcement proceeding. *See* Supreme People's Court, *Trial of Civil Damages Cases Arising from Misrepresentation in the Securities Market Several Provisions*, art. 6 (Jan. 9, 2003) (P.R.C.) (requiring plaintiff to submit evidence of the administrative penalty or criminal judgment as the foundation, or "yiju," for a civil action), *available at* http://www.chinalawandpractice.com/Article/1693266/Search/Trial-of-Civil-Damages-Cases-Arising-from-Misrepresentation-in-the.html?Keywords=%22Trial+of+Civil+Damages+Cases+Arising+from+Misrepresentation%22 (unofficial translation).[12]

In those nations that do allow private enforcement, moreover, it often bears little resemblance to private enforcement in the United States. Irrespective of the degree of similarity between the substantive content of U.S. securities laws and those of other nations, extraterritorial application of U.S. remedies in cases brought

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[11] These choices can be finely tuned. Although the United States generally permits private actions for securities fraud, Congress has determined that alleged aiders and abettors "should be pursued by the SEC and not by private litigants." *Stoneridge*, 552 U.S. at 163.

[12] *See also* Comm. of European Securities Regulators, *Executive Summary to the Report on Administrative Measures and Sanctions as well as Criminal Sanctions Available in Member States under the Market Abuse Directive*, CESR-08-099, at 2 (Feb. 2008) (noting wide divergence in civil and criminal sanctions that apply to fraud, insider trading and market manipulation in enforcement proceedings), *available at* http://www.cesr.eu/index.php?page=document_details&id=4975&from_id=22.

under Section 10(b) would thus "unjustifiably permit [foreign] citizens to bypass their own [nations'] less generous remedial schemes, thereby upsetting a balance of competing considerations that their own [nations'] ... laws embody." *Empagran*, 542 U.S. at 167.

An obvious example is presented by the fact that "[o]nly a few other nations have adopted the class action device even to a limited extent[.]" Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 Duke J. Comp. & Int'l L. 157, 157-158 (2001); *see also, e.g.*, Coffee, Jr., 56 U. Pa. L. Rev. at 267 ("Class actions remain rare to unknown in Europe[.]"). Even in those countries having a group-litigation mechanism, "few are structured in a manner similar to the U.S. class action." Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1597 (2005).

Of critical importance, the U.S. "opt-out mechanism" in class actions "is seen as contrary to public policy in most countries"[13]—so much so that in some countries, there is a risk that "courts will not recognize a U.S. judgment against [an absent] class member."[14] This risk exists in, among other countries, the United Kingdom,[15] Germany, Denmark, Luxembourg, and

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[13] Buxbaum, 46 Colum. J. Transnat'l L. at 63.

[14] Buschkin, 90 Cornell L. Rev. at 1580-1581.

[15] *See Campos* v. *Kentucky & Ind. Terminal R.R. Co.*, 2 Lloyd's Rep. 459, 473, 1962 WL 22148 (Q.B. 1962) (stating in dicta that "in accordance with English private international law a for-

Switzerland.[16] Foreign defendants thus may settle, or prevail in, a global class action filed in a U.S. court, only to find themselves sued abroad by foreign persons who are members of the class or for the same conduct. *See, e.g., Bersch*, 519 F.2d at 996 ("[W]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty. This point must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs' judgment or a settlement deemed to be inadequate.").

Another example: "The United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance based on misleading information." Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62 (2007). Australia is one of the nations that has not recognized the fraud on the market presumption. Duffy, *"Fraud on the Market": Judicial Approaches to Causation and Loss from Se-*

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eign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment"); *see also* Briggs & Rees, *Civil Jurisdiction and Judgments* 573 (4th ed. 2005).

[16] *See* Declarations in Support of Defendants' Motion to Dismiss Foreign Lead Plaintiffs' Claims For Lack of Subject Matter Jurisdiction, *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (S.D.N.Y. filed Sept. 30, 2009) (Dkt. Nos. 120, 122, 124-126).

curities Nondisclosure in the United States, Canada and Australia, 29 Melb. U. L. Rev. 621, 655 (2005).[17]

As demonstrated in Part I, *supra*, there is no reason to assume that Congress intended effectively to impose our nation's resolution of the foregoing substantive, remedial, evidentiary and procedural issues on other sovereign nations. As this Court has put the point: "Congress might have hoped that America's ... laws ... would commend themselves to other nations as well. But, if America's ... policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169. Nor is there reason to conclude that it would be in the United States' interest for all nations to mimic its approach. Far from it: Just as under our "federal system ... a single ... state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), so too in the international sphere, "[a]pproaches that prove to be efficient regulatory devices can lead the way for other nations," Cox, *Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies*, 16 Hastings Int'l & Comp. L. Rev. 149,

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[17] The United States also stands virtually alone in other ways. "Loser-pays rules governing liability for attorney['s] fees" are "followed nearly everywhere but in the United States." Rowe, Jr., 11 Duke J. Comp. & Int'l L. at 159. In many countries, "contingent fees are not permitted." Coffee, Jr., 156 U. Pa. L. Rev. at 267.

156-157 (1993).[18] "[A] multiplicity of jurisdictions—each seeking to develop the best regulatory framework .... This is something from which we all can benefit: observing what works, and how the market responds, and learning from what doesn't work." SEC Chairman Christopher Cox, Speech before the 34th Annual Securities Regulation Institute (Jan. 24, 2007), *available at* http://www.sec.gov/news/speech/2007/spch012407cc.htm.

III. A Bright-Line Test As To The Extraterritorial Reach, If Any, Of The U.S. Securities Laws Is Necessary, So As To Respect The Interests Of Other Sovereign Nations

This brief advocates a bright-line test under which a plaintiff who purchased or sold the securities of a foreign issuer in a foreign market would not have a private right of action under Section 10(b). An important practical virtue of this test—or any similarly bright-line test, such as one that categorically precludes "foreign-cubed" claims—is that it enables district courts to adjudicate on the pleadings, and the parties to know at the outset of the case, which private plaintiffs have stated a cause of action and which have not. Such a bright-line test is important not merely because in general, "[p]rivate securities fraud actions ... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor*

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[18] The importance of allowing nations to experiment remains even if all were to have similar regulatory approaches at a given point in time; extending the Section 10(b) private cause of action would diminish the ability of other nations to make changes to their securities laws, thereby depriving the United States of real-world experiments from which to learn.

Issues & Rights, Ltd., 551 U.S. 308, 313 (2007). It is also necessary as a matter of comity: Absent a bright-line rule as to the extraterritorial scope (if any) of the statute, foreign issuers will often be subjected to the burdens and uncertainty of intensive U.S. discovery, pre-trial litigation, and perhaps trial before plaintiffs' claims can be ruled out-of-bounds as improperly extra-territorial, and by that time much harm to the foreign issuer will have been done.

As discussed in Part I, *supra*, the principle that ambiguous statutes are ordinarily construed "to avoid unreasonable interference with the sovereign authority of other nations," *Empagran*, 542 U.S. at 164, counsels in favor of holding that Section 10(b) has no extraterritorial reach. The same principle also requires fashioning a test governing that subject that permits straightforward resolution at the outset of a litigation. Otherwise, there is a great risk that claims on behalf of a global putative class will proceed against a foreign defendant deep into a case, at great interference with other nations' interests—whatever the ultimate resolution.

If, for example, another nation has chosen to preclude private securities suits in favor of public enforcement, or to adopt rules that encourage plaintiffs to bring only particularly meritorious claims, a dismissal following substantial discovery and litigation in the United States may impose burdens and costs on a foreign issuer that likely would not have been imposed under the law of the company's own nation—and thus stands to affect that company in ways not desired by that nation. *Cf. Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 242 (2007) ("T]he very purpose of sovereign immunity is to avoid subjecting a foreign sovereign to the rigors and 'inconvenience of

suit.'"); *United Phosphorus, Ltd* v. *Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc) (treating a provision of the FTAIA as affecting "subject matter jurisdiction," and thus allowing for early resolution of a suit, "reduces the potential for offending the economic policies of other nations").

These concerns are well illustrated by considering the operation, in practice, of a fact-dependent "conduct" test. To date, because the courts of appeals have regarded the extraterritoriality inquiry as one of subject-matter jurisdiction, the district courts have had authority to resolve issues of improper extraterritorial scope (couched in terms of lack of subject-matter jurisdiction) at the outset of the litigation. These courts have tended to resolve such claims expeditiously and efficiently, based on the allegations within the complaint or, increasingly, on factual declarations submitted by the parties. However, should the Court regard the question of extraterritoriality as relevant not to jurisdiction but instead to whether the facts of the case are within the scope of the cause of action impliedly authorized, it is not clear that district courts, as opposed to the jury, would retain authority to resolve factual disputes bearing on that question.

Under those circumstances, a malleable, fact-specific standard such as a "conduct" test might well open the door to protracted discovery, pretrial litigation—and, assuming that material facts were in dispute—jury trial on these issues. Securities class actions, especially those against foreign companies on behalf of a global putative class, commonly involve astoundingly long complaints, which recite dozens of allegedly false or misleading statements or material omissions, made over a lengthy period, in connection

with annual reports, press releases, conference calls, regulatory filings, or investor presentations.[19]

Under a multi-factor "conduct" test, relevant issues might include whether "activities in this country were more than merely preparatory," "what and how much was done in the United States and on what and how much was done abroad," and, ultimately, in which country corporate authority for each allegedly actionable statement or material omission rested. *See Morrison* v. *National Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008). Under such a test, depending on the allegations in the case, detailed discovery might be necessary on a vast range of subjects: Where was each statement made? Who made it? Where did the speakers work? Who authorized each statement? Where did those persons work? If a statement was made on a conference call, who else was in the room? Who authorized the call? Was it designed for U.S. investors or foreign investors? Who was responsible for ensuring the accuracy of information disclosed to the public during the call—and more generally? Where did those persons

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[19] *See, e.g., In re Societe Generale Sec. Litig.*, No. 08 Civ. 2495 (S.D.N.Y. filed Jan. 8, 2010) (204-page second amended complaint alleging numerous actionable statements or omissions in connection with shareholder letters, press releases, filings, conference calls, and statements to a foreign newspaper); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (S.D.N.Y. filed May 8, 2009) (548-page consolidated amended complaint alleging actionable statements or omissions in connection with 64 different documents or events over more than 5 years); *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758 (S.D.N.Y. filed Oct. 21, 2008) (200-page amended complaint alleging numerous actionable statements or omissions in connection with annual and quarterly reports, conference calls, presentations, an interview with Reuters, and correspondence with the SEC).

work? What should be deemed the relevant headquarters of the company?[20] In an era in which complex litigation is dominated by electronic discovery, document production and depositions on these multiplying questions in a global class action would likely take many months, if not years, at massive expense, primarily to the defense. For the foreign issuer, it would be little solace that, at the end of this process, a district court (on summary judgment), a jury, or an appellate court might conclude that certain—or all—of the plaintiffs' claims were outside the territorial scope of Section 10(b).

A nebulous test, moreover, would make it impossible for foreign companies "to determine in advance whether their activities are likely to subject them to

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[20] *See, e.g., In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1316 (11th Cir. 2009) ("Although other divisions of the Company's headquarters were located in ... England, the headquarters operations which were central to the misconduct in this case were located ... in Tampa." (internal quotation marks omitted; alteration incorporated)); *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758, __ F. Supp. 2d ___, 2009 WL 3241404, at *10 (S.D.N.Y. Oct. 5, 2009) (discussing relevance of allegation that certain executives who participated in conference calls "resided in the United States at the time [the] calls were made"); *City of Edinburgh Council ex rel. Lothian Pension Fund* v. *Vodafone Group Public Co.*, No. 07 Civ. 9921, 2008 WL 5062669, at *4 (S.D.N.Y. Nov. 24, 2008) (reviewing "evidentiary submissions includ[ing[slides from [a] ... presentation held in New York City"); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 565, 566 n.11 (S.D.N.Y. 2008) ("key decisions underlying the alleged misrepresentations ... were made in Switzerland," though the "scheme necessarily involved communication with the North American employees"); *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158, 169-170 (S.D.N.Y. 2003) (focusing on two corporate officers' "decision to move to the United States, allegedly to better direct corporate operations").

[suit in the United States]," and thus would unavoidably extend the reach of U.S. law into conduct properly governed by other nations' laws. *See* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985). For this reason, as former Judge Bork aptly observed, a conduct test, turning as it does "on a welter of specific facts," is both "difficult to apply" and "inherently unpredictable, and "present[s] powerful incentives for increased litigation." *Zoelsch*, 824 F.2d at 32 n.2. Simply put, it fails to achieve what is required by comity: efficient resolution of claims that threaten, if unresolved, to interfere with another nation's ability to regulate its own affairs.

A final shortcoming of an unpredictable test of extraterritoriality is the pressure to settle that it, inevitably, would place upon a foreign issuer defendant. The intense pressure to settle securities class actions that survive an initial motion to dismiss is well-chronicled. *See, e.g., Blue Chip Stamps*, 421 U.S. at 740-741. But foreign issuer defendants are particularly vulnerable to such pressure, because they are, frequently, sued in the name of a putative massive *global* class of plaintiffs. And while the vast majority of such a putative class often consists of persons who have purchased shares on a foreign market and rightfully should be precluded from bringing suit in the United States, *see* Part I, *supra*, under a "conduct" test, claims on behalf of such class members may remain in the case through verdict or appeal. In such circumstances, foreign issuers thus face

the possibility of a massive judgment far exceeding what the company can bear, or risk.[21]

By contrast, the test that amici advocate—in which private plaintiffs, categorically, would not have a cause of action against a foreign issuer for alleged false disclosures in connection with the purchase or sale of securities on a foreign market—is a bright-line test. Its adoption, as the test of extraterritoriality, would enable all parties at the outset of a case to know which plaintiffs' claims fell within the territorial scope of Section 10(b). The Court has authority to adopt such a test, as part of the process of defining "the contours of [the] private cause of action under Rule 10b-5" and "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737; *see also Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104 (1991).[22]

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[21] Because under a nebulous test such as the "conduct" test foreign issuers can avoid this risk only by avoiding doing business in the United States entirely, such a test necessarily provides a disincentive for foreign investment in the United States. *See* Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents 25-26 & n.53.

[22] At least one commentator has identified an alternative means to reach the same result: treating the issue of extraterritoriality as one of statutory standing, and holding that plaintiffs who purchased shares of a foreign company on a foreign exchange lack standing to bring claims under Section 10(b). *See* Reuveni, 43 U.C. Davis L. Rev. ___, manuscript at 55-66.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-1191

In the Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *ET AL.*,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL CHAMBER OF COMMERCE, THE SWISS BANKERS ASSOCIATION, ECONOMIESUISSE, THE FEDERATION OF GERMAN INDUSTRIES AND THE FRENCH BUSINESS CONFEDERATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE INTERNATIONAL CHAMBER OF COMMERCE, THE SWISS BANKERS ASSOCIATION, ECONOMIESUISSE, THE FEDERATION OF GERMAN INDUSTRIES, AND THE FRENCH BUSINESS CONFEDERATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici curiae—associations representing international and non-U.S. businesses and global financial institutions—share a significant common interest in ensuring stable and predictable legal regimes affecting international trade and investment.[1] In the aggregate, the organizations filing this brief represent a substantial portion of all non-U.S. entities doing business in the United States. The *amici* regularly file *amicus* briefs in cases such as this one that raise issues of vital concern to the non-U.S. business community.

The International Chamber of Commerce ("ICC") is the world business organization representing thousands of companies, chambers of commerce and business associations in 130 countries. Among other functions, the ICC promotes voluntary rules governing the conduct of business across borders that are observed in countless thousands of transactions every day; provides essential trade-related services such as the ICC International Court of Arbitration, the world's leading arbitral institution; and consults

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

on issues of international trade for the United Nations and its specialized agencies.

The Swiss Bankers Association ("SBA") is the leading professional organization of the Swiss financial center, the members of which include the vast majority of banks and other financial institutions operating in Switzerland. Its purposes include setting standards that govern the operation of banks in Switzerland and promoting the interests of the Swiss financial center, both at home and abroad.

Economiesuisse is the largest umbrella organization representing the Swiss economy. Economiesuisse is comprised of more than 30,000 businesses of all sizes, employing a total of 1.5 million people in Switzerland. Economiesuisse's mission is to create an optimal economic environment for Swiss business, to continuously improve Switzerland's global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

The Federation of German Industries ("BDI") is the umbrella organization for all industrial businesses and industry-related service providers in Germany. It represents 34 industrial sector federations and has 15 regional offices in Germany. The BDI speaks for more than 100,000 private enterprises employing roughly eight million people.

MEDEF, the French Business Confederation, represents more than 700,000 companies of all sizes and sectors of business, including industry, commerce and services. About 15 million persons are employed by MEDEF members. MEDEF attempts to ensure that, in the development of rules affecting

cross-border business, equity and consistency are respected for all countries.

SUMMARY OF ARGUMENT

Section 10(b) does not apply to allegedly fraudulent statements a non-U.S. security issuer makes ***outside the United States.*** Rather, Section 10(b) reaches only deceptive devices or contrivances used or employed within this country. A holding to the contrary would substantially deter direct foreign investment in the United States. As these *amici* can attest, and as scholarly studies repeatedly have confirmed, potential U.S. class action litigation is chief among the concerns of would-be investors in the U.S. marketplace. Imposing securities liability simply because a non-U.S. company has a subsidiary or branch in the United States is likely to deter investors from entering the U.S. entirely, to the detriment of the United States economy.

Causation tests for determining the reach of Section 10(b) liability—such as those advocated by petitioners and the Solicitor General, and adopted by the court below—are precisely the type of subjective and highly fact-specific rules that drive foreign direct investment to other, non-U.S. markets.

The plain language of Section 10(b) and the relevant canons of statutory construction, applied in a rigorous and principled fashion, establish a bright line test that leaves no room for consideration of causation in assessing the extraterritorial reach of Section 10(b). Section 10(b) proscribes the "use or employ[ment]" of a "deceptive device or contrivance" in connection with the purchase or sale of a security. The presumption against extraterritorial application of federal statutes thus requires that Section 10(b)

apply only to a defendant's "use or employ[ment]" ***in the United States*** of a "deceptive device or contrivance." In this case, however, the deceptive conduct at issue—NAB's purported fraudulent misstatements—allegedly occurred and were relied upon ***in Australia***. As such, Petitioners' claims fall beyond the scope of Section 10(b).

This interpretation of Section 10(b) is further confirmed by the canon that Congress legislates with due respect for comity and the interests of non-U.S. sovereigns. The nations from which *amici* hale have enacted robust anti-securities fraud regimes that reflect thoughtful policy choices about how best to achieve investor protection. Applying U.S. law to deceptive devices or contrivances that occur abroad, effectively trumping non-U.S. policy choices, significantly undermines comity.

The proper construction of Section 10(b) makes equal sense when the transaction at issue happens not on an exchange, but in another context, such as face-to-face transactions. In such transactions, if a U.S. audience is targeted—*i.e.*, if misrepresentations are used or employed in the United States—Section 10(b) may be applicable.

Although this interpretation of Section 10(b) applies equally to the SEC, it will not undermine the SEC's ability to fulfill its mission. Rather, it will provide the SEC enforcement authority over all fraudulent conduct occurring in or directed into the United States.

Finally, in addition to the limits on the extraterritorial reach of Section 10(b) due to its plain language, the Court should take account of the significant jurisprudential and practical considerations

underlying the scope of the private cause of action. These concerns militate against extending the judicially created cause of action under Section 10(b) to either non-U.S. persons who purchase the shares of non-U.S. issuers on non-U.S. exchanges, or to U.S. persons who do not rely upon fraudulent statements, misrepresentations, or omissions used or employed within the United States.

ARGUMENT

I. APPLICATION OF SECTION 10(B) TO CONDUCT OCCURRING ABROAD UNDER VAGUE, EXPANSIVE STANDARDS IS LIKELY TO SUBSTANTIALLY REDUCE FOREIGN DIRECT INVESTMENT IN THE UNITED STATES.

Foreign direct investment ("FDI") is vitally important to the U.S. economy.[2] FDI creates jobs for Americans, increases the availability and lowers the cost of capital, and is a significant source of new technologies.[3] The U.S. share of global FDI has declined since the late 1980s, indicating that the United States must compete more effectively to attract FDI in an increasingly competitive global marketplace.[4]

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[2] See U.S. Dep't of Commerce, Bureau of Econ. Analysis, *International Economic Accounts: Balance of Payments (International Transactions)*, http://tinyurl.com/ygws9sr (last accessed February 26, 2010).

[3] See U.S. Dep't of Commerce, Int'l Trade Admin., *Benefits of FDI*, http://tinyurl.com/ykbxnmx (last accessed February 26, 2010).

[4] See U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 2-3 (Oct. 2008), http://tinyurl.com/yzbznt9.

Vague, expansive standards for the extraterritorial reach of U.S. securities fraud prohibitions—like those urged by the Petitioners and the Government here—would substantially undermine this country's ability to obtain FDI. As detailed by Bloomberg-Schumer Study, authored by McKinsey & Co. and the New York City Economic Development Corporation, the twin problems of "the increasing *extraterritorial reach* of US law" and "the *unpredictable nature* of the legal system" are "significant factors that caused" U.S. markets to lag in competiveness. Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 73 (Dec. 2006) (emphasis added), http://tinyurl.com/yf3uu6o. Would-be investors are increasingly worried that even "the mere threat of legal action can seriously—and sometimes irrevocably—damage a company." *Id.* at 76.

This Court too has recognized that "'a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)). Vague tests force companies "to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Id.* at 188-89. Although bright line rules may on occasion "exclud[e] plaintiffs who have in fact been damaged by violations of Rule 10b-5," this Court has nevertheless insisted on clear

rules controlling the scope of liability under Section 10(b). *Blue Chip Stamps*, 421 U.S. at 742-43.

Petitioner's proffered rule, in contrast, is the antithesis of a bright line: They suggest using "proximate cause" to distinguish between "unbroken acts of fraud," for which they would impose extraterritorial liability, and "independent conduct that breaks the causal chain," for which they would not. Pet. Br. 29-30. This calls for an inquiry that "turn[s] on a welter of specific facts" resulting in a test "difficult to apply and * * * inherently unpredictable." *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987). See also *Adams* v. *Star Enter.*, 51 F.3d 417, 424 n.9 (4th Cir. 1995) ("proximate causation is a fact-specific inquiry that is normally left to a jury"). Petitioners' own argument, that the Second Circuit erred in holding that the causal chain here was too tenuous to support liability, demonstrates just how amorphous and subjective their test would be. And the Government's rule, also a causation test, would offer no greater clarity.

These approaches would license the plaintiffs' securities bar to engage in limitless discovery amounting to nothing more than fishing expeditions into the cross-border operations of non-U.S. entities, imposing excessive and unnecessary costs whenever they restate their earnings in their home countries or suffer a fluctuation in a stock listed on their home country exchange. Adopting any variant of such a rule would exacerbate the trend of non-U.S. investors directing their capital and operations elsewhere.

II. THE PLAIN TEXT OF SECTION 10(B) REACHES ONLY A "MANIPULATIVE OR DECEPTIVE DEVICE" THAT A DEFENDANT "USE[S] OR EMPLOY[S]" IN THE UNITED STATES.

By its terms, Section 10(b) prohibits, in connection with the purchase or sale of a security, the "use or employ[ment]" of a "manipulative or deceptive device or contrivance." 15 U.S.C. § 78j. Because the statute is silent as to its extraterritorial reach, the long-standing canon cautioning against interpreting federal statutes to apply abroad—that is, the presumption that "United States law governs domestically but does not rule the world" (*Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454-55 (2007))—requires that the statute reach only prohibited conduct that occurs in the United States. That means that Section 10(b) prohibits the "use or employ[ment]" ***within the United States*** of a "manipulative or deceptive device or contrivance." That understanding is further confirmed by the principle that Congress legislates with due respect for the laws of non-U.S. nations that police the same conduct when it occurs abroad. See *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

This rule is not novel. The D.C. Circuit announced this precise principle over two decades ago: "jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5." *Zoelsch*, 824 F.2d at

33.[5] The court explained that "this test is only a slight recasting, if at all, of the traditional view that jurisdiction will lie in American courts only over ***proscribed acts done in this country***." *Ibid.* (emphasis added).

This rule disposes of Petitioners' claims: the fraudulent conduct they allege occurred—if anywhere—in Australia. Australia, and not the United States, is where Petitioners contend that NAB "used" a "deceptive device;" *i.e.*, where NAB allegedly made the misstatements on which the plaintiffs in Australia say they relied. There simply is no allegation that NAB "use[d] or employ[ed]" those statements in the United States. That is fatal to their claim.

A. The Presumption Against Extraterritorial Application Of U.S. Law Limits The Scope Of Section 10(b).

Congress did not express a clear intent for Section 10(b) to apply extraterritorially; the provision therefore reaches only violations of the statute that occur within the United States. In arguing to the contrary, Petitioners seek to undo this Court's reasoning in *Stoneridge*; that attempt must be rejected. And, despite the Government's contention, construing Section 10(b) the way Congress wrote it will not adversely impact the SEC's enforcement authority.

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[5] *Zoelsch*, like most Section 10(b) cases from the Courts of Appeals, viewed this issue as one of jurisdiction. 824 F.2d at 33. Petitioners, Respondents, and the Government alike agree that the question is not subject matter jurisdiction (controlled by Fed. R. Civ. P. 12(b)(1)), but rather the scope of Section 10(b) liability (controlled by Fed. R. Civ. P. 12(b)(6)). See Pet. Br. 15-20; Resp't. Br. 22; U.S. Cert. Br. 8-11.

1. Section 10(b) reaches only proscribed conduct that occurs within the United States.

The Court consistently has reaffirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil, Co.*, 499 U.S. 244, 248 (1991) ("*ARAMCO*") (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). "[U]nless there is 'the affirmative intention of the Congress clearly expressed'" to apply Section 10(b) abroad, it must be limited to controlling only domestic conduct. *Ibid.* (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

No such intent appears in the language of the statute. On its face, the text of Section 10(b) is silent as to the location of the prohibited conduct: it simply prohibits "any person" from "us[ing] or employ[ing], in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j. The statute does not state where the defendant must "use or employ" the "device or contrivance" for liability to attach.

Other provisions of the Exchange Act, however, indicate that Section 10(b) does *not* reach non-U.S. conduct. In Section 30(b), Congress regulated certain transactions in U.S. securities that occur abroad. 15 U.S.C. § 78dd. For example, Congress prohibited security issuers from giving non-U.S. officials anything of value to gain a business opportunity. 15 U.S.C. § 78dd-1(a)(1). This provides context-specific proof of "Congress' awareness of the need to make a clear statement that a statute applies

overseas * * *." *ARAMCO*, 499 U.S. at 258. Nothing in Section 10(b) provides such a clear statement.

Moreover, the Exchange Act expressly confirms that it was intended to protect the "*national* public interest" by safeguarding the "*national* market system for securities." 15 U.S.C. § 78b (emphasis added). See also *Zoelsch*, 824 F.2d at 31 ("[I]t is quite clear that the Securities Exchange Act of 1934 had as its purpose the protection of American investors and markets."). Nor is there any legislative history to suggest a broader interpretation of the statute. See *id.* at 31-32. See also Margaret V. Sachs, *The International Reach of Rule 10B-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677 (1990) (arguing that at time of drafting the Exchange Act, Congress was aware of non-U.S. security issuers, but chose not to regulate transactions occurring abroad).

This interpretative canon, therefore, compels the conclusion that for Section 10(b) to apply, a defendant must "use or employ" ***in the United States*** an unlawful "device or contrivance" "in connection with the purchase or sale of any security." In other words, Section 10(b) attaches if a non-U.S. entity issues statements ***in the United States*** that violate a "duty to disclose" (*Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008)) or that "communicate to the public" (*ibid.*) fraudulent information.[6]

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[6] It could be argued that the canon against extraterritorial application of the statute requires not only that the "use or employ[ment]" of the "deceptive device or contrivance" occur in the United States, but also that "the purchase or sale" of a security ("in connection with" the "use or employ[ment]" of the

Whether a defendant engages in proscribed conduct in the United States by "using or employing" a device or contrivance unlawful under Section 10(b) is a straightforward inquiry. If a non-U.S. entity uses or employs fraudulent statements in the United States in connection with the purchase or sale of a security (*e.g.*, at a road show, through a U.S.-based marketing office, or by directing phone calls or e-mails into the United States), the issuer will have violated Section 10(b) by "us[ing] or employ[ing]" ***in the United States*** a "manipulative or deceptive device or contrivance." 15 U.S.C. § 78j. For example, if a non-U.S. Ponzi schemer targets individuals in the United States and makes fraudulent representations in the United States in connection with the sale of a security, that conduct would fall within the ambit of Section 10(b). If an investor relies on the statements made in the United States to his or her detriment, a civil claim also may lie.

But a non-U.S. entity does not "use or employ" in the United States a "manipulative or deceptive device or contrivance" if it releases allegedly fraudulent statements in its own country not in any way targeted to U.S. investors. To be sure, it is possible that U.S. investors may reach outside the United States and obtain those statements on their own initiative—e.g., via the internet—and subsequently use them when making an investment. But Section 10(b) prohibits the use of a fraudulent statement *by the* defendant, and not *by the investor*. Thus, by simply

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"deceptive device or contrivance") likewise occur within the United States. The Court need not resolve that question in this case, because it is clear that the "deceptive device" cited by petitioners was not "use[d]" by NAB in the United States.

releasing a statement abroad that might ultimately come into the possession of a U.S. investor, a ***defendant*** will not have "***use[d] or employ[ed]***" a fraudulent statement ***in the United States***. Investors who rely on such extraterritorial statements have no remedy under Section 10(b). Only those who have relied on U.S. conduct may pursue a civil claim.

Finally, investors claiming injury from the defendant's use or employment of the false statements in other countries may not assert claims under Section 10(b)—even if the statement also was used or employed in the United States as well—because those investors' alleged injuries stem from the use or employment of the statements outside the United States. They may not circumvent the statutory requirement of injury from conduct within the United States by piggybacking on the claims of U.S. investors whose alleged injury does flow from U.S.-based conduct.

2. Petitioners' claim that their interpretation does not apply Section 10(b) extraterritorially misconstrues the presumption against extraterritoriality and the text of Section 10(b).

Under Section 10(b), the prohibited conduct that must occur in the United States to avoid running afoul of the presumption against extraterritoriality is the use or employment within the United States of a "manipulative or deceptive device or contrivance"—here, allegedly false statements. That did not happen. Petitioners acknowledge that the allegedly fraudulent statements upon which they relied were made "in Australia." Pet. Br. 25.

Petitioners assert (Pet. Br. 32-34) that applying Section 10(b) in the instant case is consistent with the presumption against extraterritoriality because some conduct, not itself sufficient to establish a violation of Section 10(b), occurred here. They point to the gathering and analysis of information later incorporated into the disclosures and offering materials used or employed outside of the United States. Pet. Br. 8-10.

But an extraterritorial application of a statute is not made territorial simply because some acts that in some way contributed to the offense occurred in the United States—the conduct constituting the offense must have occurred here. Otherwise extraterritoriality would become an entirely elastic concept, turning entirely on litigants' ingenuity in asserting that "relevant" conduct occurred within the United States.

"The difference between a domestic application of United States law and a presumptively impermissible extraterritorial application of United States law" turns on the occurrence within the United States of "the conduct that the law prohibits." *Pakootas* v. *Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1077-78 (9th Cir. 2006) (holding that because "the operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance" and not "[a]rranging for disposal of such substances," the former, and not the latter, is "controlling for purposes of assessing whether CERCLA is being applied extraterritorially").

Petitioners' concession that the allegedly fraudulent statement occurred in Australia is therefore dispositive of the extraterritoriality issue in this case.

3. The Court should reject petitioners' attempt to undermine Stoneridge.

Unable to shrink the definition of extraterritoriality, petitioners next seek to expand the definition of a violation of Section 10(b), suggesting that any act that is a "substantial and material link in the chain of events leading to the foreign investors' losses" is sufficient to give rise to Section 10(b) liability. Pet. Br. at 25.

This Court in *Stoneridge* directly rejected the concept of liability based on anything less than a violation of "*each* of the elements or preconditions for liability." 552 U.S. at 158 (emphasis added). *Stoneridge* explains that, in a civil suit, where a defendant's "acts or statements were not relied upon by the investors * * *, liability cannot be imposed upon respondents." *Id.* at 159. Moreover, the Court found that liability does not accrue based on an "indirect chain" of causation that was "too remote for liability." *Ibid.* Yet here, Petitioners would impose liability based upon U.S. conduct on which they did not rely.

Further, in arguing that the alleged conduct by NAB's Florida subsidiary, HomeSide, was "primary, not secondary; central, not incidental," (Pet. Br. 25), Petitioner's seek to revisit *Stoneridge*'s conclusion that a respondent's conduct is *not* "primary" or "central," where "nothing respondents did made it necessary or inevitable for [the issuer] to record the transactions as it did." 552 U.S. at 161. Rather, a theory of "scheme liability"—which Petitioners essentially propose here—"does not answer the objection that petitioner did not in fact rely upon [HomeSide's] own deceptive conduct." *Id.* at 159-60. Here, Petitioners do not (indeed, cannot) contend

that they relied upon statements made by HomeSide. Thus, under *Stoneridge*, HomeSide's conduct cannot be considered primary or central.

Applied in this context, the import of *Stoneridge* is clear: HomeSide's alleged conduct itself does not support a Section 10(b) civil claim. And Petitioners may not use this conduct to bootstrap a claim against NAB where NAB's alleged misrepresentation occurred abroad. Moreover, Petitioners' reading overreaches; it would, whenever U.S. data were used to prepare a non-U.S. disclosure, "convert[] a single act of supply from the United States into a springboard for liability" to be imposed upon fundamentally extraterritorial conduct. *Microsoft*, 550 U.S. at 456.

4. Construing Section 10(b) to apply only to U.S. conduct would not inappropriately limit SEC enforcement.

Interpreting Section 10(b) in accordance with settled principles of statutory interpretation will not hamper the SEC's ability to fulfill its mandate, because the SEC may bring enforcement actions whenever a deceptive device or contrivance is used or employed here.

First, focusing on the place of the alleged misconduct fully addresses the SEC's fear of "open[ing] a 'Barbary Coast' safe harbor for fraud that occurred here but led to injury abroad." Pet. Br. 7-8 (quoting *SEC* v. *Kasser*, 548 F.2d 109, 126 (3d Cir. 1977)). "Outbound" fraud committed in the United States and directed at citizens of other nations would fall within the scope of Section 10(b). Cf. *Kasser*, 548 F.2d at 110 (SEC could bring enforcement action against "defendants who have allegedly engaged in

fraudulent conduct within the United States, when the sole victim is a foreign corporation").

Nor would *amici*'s reading allow "perpetrators * * * [to] escape accountability in *any* jurisdiction" were it adopted globally. U.S. Cert. Br. 12. A fraudulent statement, or other device or contrivance, must be used or employed in at least *one* jurisdiction, and that jurisdiction will have the power to initiate an enforcement action. Here, NAB's allegedly fraudulent statements made and relied upon in Australia are subject to Australian securities law. There exists no gap in international enforcement.

Second, many non-U.S. issuers of securities that are publically-traded on non-U.S. exchanges (including Respondent NAB), offer their equity on a U.S. exchange though American Depositary Receipts ("ADRs"). See American Depositary Receipts, Exchange Act Release No. 274, 1991 WL 294145, at *2 (S.E.C. May 23, 1991). Even ADRs that are exempt from Exchange Act reporting are required to post, for the benefit of U.S. ADR buyers, disclosures that are subject to the antifraud provisions of the securities laws. See Ziegler, Ziegler & Assoc. LLP, *The U.S. Legal Environment for Sponsored and Unsponsored ADR Programs* (Apr. 10, 2009), http://tinyurl.com/yfvo6o8.

Third, the SEC enjoys significant authority that private plaintiffs do not. Unlike a private litigant, the SEC need not show reliance, economic loss, or causation, and may bring cases for attempted fraud. See *United States v. Hagan*, 521 U.S. 642, 650-51 (1997). Thus, if a non-U.S. issuer makes material misrepresentations here in connection with the purchase or sale of a security, the SEC will have enforcement authority even if no U.S.-based persons

detrimentally rely on this conduct. The SEC has enforcement authority over *all* such securities fraud that occurs in the United States.

For these reasons, there is no need to ignore conventional statutory interpretation principles and adopt the amorphous standard that the SEC advocates, extending Section 10(b) to a "fraudulent scheme [that] bears a sufficient connection to the United States." U.S. Cert. Br. 11. Section 10(b), by its plain terms, prohibits the use of a "manipulative or deceptive device or contrivance," and the canon against extraterritorial application means that precisely that proscribed conduct must occur in the United States. A test turning on whether or not the "scheme" is "sufficient[ly] connect[ed]" to the United States is a standard of the Government's own design, constructed specially for this statute. It should be rejected by this Court.

B. Principles Of Comity Confirm That Section 10(b) Does Not Apply To Non-U.S. Conduct.

This Court interprets federal statutes so that they do not interfere with the appropriate function of non-U.S. law. Petitioners' expansive extension of Section 10(b), however, would do exactly that.

1. Section 10(b) must be interpreted to accord comity to non-U.S. law.

Section 10(b) should be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in

harmony—a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

As *Empagran* explained in the anti-trust context, the United States has no interest in the application of its laws to "foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim." *Id.* at 165 (emphasis omitted). Although Congress may hope that the principles underlying its laws (here, the Exchange Act, in *Empagran*, the Sherman Act) "would commend themselves to other nations," Congress does not seek "to impose them, in an act of legal imperialism, through legislative fiat." *Id.* at 169. Section 10(b) accordingly must be interpreted to avoid creating "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* at 165.[7]

2. An expansive interpretation of Section 10(b) would substantially interfere with the interests of non-U.S. nations.

The dramatic expansion of Section 10(b) liability that petitioners advocate would severely undermine international comity.

The home countries of the companies and financial institutions that are members of *amici* have, like Australia, enacted robust prohibitions against secur-

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[7] As Member countries of the Organisation for Economic Co-Operation and Development ("OECD"), the United States and Australia have agreed to "[t]ake fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries." OECD, *Conflicting Requirements Imposed on Multinational Enterprises*, http://tinyurl.com/yjpjlyn (last accessed February 26, 2010).

ities fraud and maintain an active enforcement culture dedicated to ensuring their laws are honored. But "not all nations agree on how securities markets should be designed or regulated. While there may be widespread agreement on certain forms of fraud, perhaps the classic forms of deceit or manipulation, nations have often widely divergent views on what constitutes the entire panoply of actionable securities fraud." Kellye Y. Testy, *Comity & Cooperation: Security Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 957 (1994). Other nations' remedial schemes reflect their individual and considered policy choices, and the United States should afford its fellow sovereigns' enforcement regimes the space they need to function.

Exporting the U.S. regulatory regime through private civil litigation is not only unnecessary,[8] but unwelcome. U.S. rules inevitably will fall into tension with non-U.S. law. See Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw. J. Int'l L. & Bus. 207, 208 (1996) ("Extraterritoriality results in frequent conflicts between the United States and other nations."). This, in turn, will make it harder for non-U.S. enforcement authorities to do their jobs. Cf. Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 Chi.-Kent L. Rev. 1065, 1117 (2002) ("Extraterritorial ap-

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[8] See Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry*, 77 Wash. U. L.Q. 319, 379 (1999) ("Exercising jurisdiction over foreign [securities] transactions * * * in many jurisdictions it will be redundant if foreign regulatory structures also govern the transactions and are effectively enforced.").

plication of law has become worrisome to many observers because it interferes with sovereign authority by limiting the extent to which a State can control the local conditions.").

In addition, because clarity and cooperation are the lifeblood of deterrence, muddying the waters through extraterritorial application of U.S. law will further hinder the common objective of preventing securities fraud. See, *e.g.*, Siddharth Fernandes, *F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 Conn. J. Int'l L. 267, 306 (2005).

To illustrate the foregoing points, we below highlight the regulatory regimes of several countries.

Switzerland. Switzerland unambiguously opposes extraterritorial application of U.S. law, and has informed the U.S. government that "[t]he extraterritorial assertion of jurisdiction requested by the plaintiffs in this [NAB] case would be inconsistent with established principles of international law." See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 1a. Switzerland has myriad other reasons to object to U.S. securities litigation that interferes with its sovereignty.

To begin with, Switzerland recently enhanced its supervision of its financial markets by enacting umbrella legislation—the Swiss Financial Market Supervision Act ("FINMASA")—that centralizes and harmonizes several longstanding laws governing the

Swiss financial center.[9] Swiss law requires Swiss listed entities to periodically file financial reports and imposes an ongoing duty for securities issuers to disclose potentially price-sensitive facts as they arise.[10] Moreover, Swiss Penal Code § 152 makes it unlawful for corporate officers or directors to willfully release any inaccurate or incomplete information that may cause economic damage to shareholders. A plaintiff in Switzerland may be able to bring a private civil claim for monetary damages caused by a statement intentionally designed to mislead the markets.[11] And if an issuer publishes a misleading prospectus in connection with an IPO, a civil plaintiff need only prove negligence to recover.[12]

FINMASA also creates a new regulatory agency—the Swiss Financial Markets Supervisory Authority ("FINMA")—that combines previously independent Swiss bank, insurance and anti-money laundering agencies.[13] FINMA's investor protection efforts include: enforcing Switzerland's anti-fraud prohibitions by investigating leads that FINMA generates or that are supplied by Switzerland's self-

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[9] Thouvenin Rechtsanwälte, *Switzerland: Financial Market Supervision Act*, Int'l Fin. L. Rev. (May 2009), http://tinyurl.com/yfteoqx.

[10] Listing rules enacted by SIX Swiss Exchange (formerly SWX Swiss Exchange) Art. 53 (http://tinyurl.com/yjcns7j).

[11] See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 3a; Swiss Code of Obligations Art. 41 ¶ 2, reprinted in Robert Briner, *Insider Trading in Switzerland*, 10 Int'l Bus. L. 348 (1982), http://tinyurl.com/yzvq9ss.

[12] See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 3a; Swiss Code of Obligations Art. 752.

[13] See FINMA, *FINMA Objectives*, http://tinyurl.com/yfzm4mr (last accessed February 26, 2010).

regulating stock markets; imposing administrative sanctions; and referring appropriate cases to Swiss cantonal prosecutors for criminal action.[14]

FINMA, like its predecessor agencies, regularly coordinates with the SEC, both formally and informally, and considers doing so an important aspect of fulfilling its mandate.[15] But Switzerland nonetheless deems its comprehensive approach to combating securities fraud—which includes criminal, civil and administrative enforcement—to be carefully calibrated to best achieve investor protection. As FINMA has explained, "[e]nforcement is just one of several mechanisms for enforcing regulatory compliance. This can have a significant impact on the parties involved, and FINMA takes great care in considering how and when to apply such measures."[16] Suits in the United States threaten to circumvent this thoughtful and deliberate regime.

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[14] See FINMA, Enforcement/Market Supervision, http://tinyurl.com/yhztkny (last accessed February 26, 2010).

[15] See Letter from Warren Christopher, U.S. Secretary of State, to Carlo Jagmetti, Swiss Ambassador to the United States (Nov. 3, 1993), and Letter from Carlo Jagmetti to Warren Christopher (Nov. 3, 1993) (extending the Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters to "violations of the laws and regulations governing the offer, purchase and sale of securities") (http://tinyurl.com/yzxphd3); SEC, Int'l Regulatory Policy, http://tinyurl.com/yl9qo8k (last accessed February 26, 2010) (noting "regular discussions" with FINMA).

[16] FINMA, Enforcement/Market Supervision, http://tinyurl.com/yhztkny. See also FIMNA's Principles of Enforcement, Principle 3 (Enforcement with Measured Judgment) (Dec. 17, 2009), http://tinyurl.com/yjuydve.

U.S. lawsuits also conflict with many Swiss policy judgments in the civil arena. Switzerland, for example, does not allow securities fraud class actions.[17] Likewise, Switzerland defines "materiality" of disclosures or statements differently than the United States.[18] Swiss law calculates securities fraud damages differently.[19] And Switzerland does not recognize the "fraud on the market" theory of presumed reliance.[20] Extraterritorial application of

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[17] See Samuel P. Baumgartner, *Class Actions & Group Litigation in Switzerland*, 27 Nw. J. Int'l L. & Bus. 301, 303 (Winter 2007) ("Switzerland is one of the many countries that do not currently have an American-style class action. Suggestions to examine the possibility of introducing such a procedural vehicle have met with considerable opposition.").

[18] The Swiss test considers a fact "material," in Swiss parlance, "price-sensitive" if it is "capable of triggering a significant change in market prices." SIX Exchange Listing Rule Art. 53, http://tinyurl.com/yjcns7j, whereas the U.S. test asks if "there is a substantial likelihood that a reasonable shareholder would consider [the information] important." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).

[19] Compare 15 U.S.C. § 78u-4(e) (limiting damages under the Exchange Act to no more than largest different between price paid for securities and average closing price for 90 days following announcement that cause stock drop) with Bundesgericht [BGer] [Fed. S. Ct.] 129 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 332 (damages are the difference between the actual value of the shares and the hypothetical value of the shares had no inaccurate or incomplete disclosure been made); Peter Böckli, *Schweizer Aktienrecht*, 4th ed., Zurich 2009, § 18 n.34 (same).

[20] Marco G. Carbonare et al, *Liability and Due Diligence in Connection with Equity Securities Offerings: An overview of U.S., Swiss, and German Law*, GesKR 2/2008, 129 n.62 (http://tinyurl.com/ylaq775) (whereas the U.S. law recognizes "fraud on the market," "[a]ccording to Swiss law * * * no rebut-

U.S. law in these actions thus would permit investors who have purchased Swiss securities on Swiss exchanges, and interacted with Swiss issuers only in Switzerland, to circumvent the Swiss anti-securities fraud regime.

Germany. Germany has enacted comprehensive legislation, the Securities Trading Act ("WpHG") that prohibits insider trading, market manipulation, and the provision of untrue information of crucial importance to the valuation of securities. German law also imposes liability upon issuers for failing promptly to publish inside information that directly affects them, or publishing such information that is false.[21] Investors suffering damages from securities fraud may bring suit against issuers in German courts. In August 2005, Germany enacted a law that streamlines the procedure for such suits.[22]

Germany's financial supervisory authority, the Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin") is chiefly responsible for ensuring compliance with the WpHG, and actively investigates and refers to German federal and local prosecutors securities fraud falling with the WpHG's broad ambit.[23] Germany has agreed to cooperate with the

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table presumption in favour of the existence of transaction causation exists").

[21] See German Securities Trading Act (WpHG), §§ 14, 20a, 37b, 37c (http://tinyurl.com/yjekadx).

[22] See Kapitalanleger-Musterverfahrensgesetz of [KapMuG] [Act on Streamlined Procedure for Investor Suits] August 16, 2005, http://tinyurl.com/yksc3lo.

[23] See, *e.g.*, BaFin, Annual Report 2008, at 157-64 (Nov. 9, 2009) (http://tinyurl.com/yjenvot) (describing recent prosecution of insider trading and market manipulation).

SEC in the prosecution of securities fraud matters,[24] and in practice has done exactly that.[25] But, given its commitment to address securities fraud under its own laws, and its willingness to cooperate with the SEC in appropriate cases, Germany has made plain its strenuous objection to U.S. civil suits that encroach on its sovereign prerogative to decide for itself how securities fraud occurring within its borders should be addressed.

In *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 996-97 (2d Cir. 1975), Germany submitted an affidavit explaining that, in the context of a class action by non-U.S. plaintiffs against non-U.S. issuers, Germany "would not recognize a United States judgment in favor of the defendant as a bar to an action by [its] own citizens."[26]

In April 2005, Germany enacted a law that expressly grants, in securities fraud cases, exclusive venue to the issuer's home court, and consequently blocks the enforcement of judgments or settlements in U.S. securities fraud class actions against German issuers.[27] If the U.S. judiciary continues to entertain

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[24] See generally Mem. of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, U.S.-Ger. SEC-Ger. (Bundesaufsichtsamt für den Wertpapierhandel (predecessor to BaFin)), Oct. 17, 1997 (http://tinyurl.com/yl6cxfm).

[25] *International Agreements and Understandings for the Production of Information and other Mutual Assistance*, 29 Int'l Law. 780, 821 (Winter 1995).

[26] England, Switzerland, Italy and France submitted declarations to the same effect. *Ibid.*

[27] See Zivilprozessordnung [ZPO] [civil procedure statute] Art. 32b (F.R.G.).

extraterritorial actions, other nations may well follow Germany's lead. See Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 Emory Int'l L. Rev. 467, 486 (Fall 2001) ("the unilateral approach of extraterritorial enforcement risks increased use of blocking or 'clawback' statutes that could further undermine the fragile world trade order.").

When it comes to securities regulation, Germany, like its fellow E.U. member states, places a premium on "uniformly consistent application of existing law, all with the objective of reducing the burden of regulatory costs for the industry."[28] Extraterritorial application of U.S. securities fraud standards runs counter to that goal.

France. Through legislation and regulations implemented by the French financial markets supervisory authority (the *Autorité des Marchés Financiers* or "AMF"), France has established a comprehensive set of rules to enhance transparency in its financial markets[29] and to strictly punish market abuses.[30]

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[28] Jochen Sanio, President, BaFin, Opening Remarks at the European Financial Forum (Nov. 30, 2007), http://tinyurl.com/yjogok5.

[29] These rules are found principally in the French Commercial Code (http://tinyurl.com/ykex96r), the French Monetary and Financial Code (http://tinyurl.com/yjq3v5o), and in Book II of the General Regulation of the AMF (http://tinyurl.com/yfzhehr).

[30] These rules implement the January 28, 2003 European Directive n°2003/6/EC of the European Parliament and Council on insider trading and market manipulation, http://tinyurl.com/yzj797g.

Issuers whose securities trade on regulated markets must report their financial results on a periodic basis and disclose market sensitive information as it arises. All information disclosed to the public must be exact, precise and sincere.[31] Insider trading and market manipulation are strictly prohibited[32] and may result in criminal prosecution, incarceration, and significant administrative and criminal fines.[33]

The AMF is vested with broad powers of investigation and takes a leading role in initiating proceedings when a market abuse has been committed.[34] Its power to sanction violations was recently enhanced through the establishment of an independent Sanctions Commission within the AMF and an increase in the maximum sanctions permitted. If an investor believes that one of the foregoing prohibitions has been violated, the investor may file an application with the AMF seeking an administrative sanction, initiate civil proceedings to recover losses, or initiate criminal proceedings that may, in addition to punitive measures, grant restitution to investors. Under Article 1382 of the French Civil Code, investors may recover based on negligent violations of the French securities laws. French investors may bring civil actions collectively through the appointment of

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[31] See General Regulation of the AMF, Arts. 223-1 *et seq.*, http://www.amf-france.org/documents/general/7552_1.pdf.

[32] See *id.*, Arts. 611-1 *et seq.*, http://tinyurl.com/yzro3v5.

[33] See Monetary and Financial Code, Arts. L. 465-1 *et seq.* (Fr.), http://tinyurl.com/yjq3v5o (imposing up to 2-years imprisonment and 1,500,000 euros fine); *id.* Art. L. 621-15 (imposing up to 10,000,000 euros fine or confiscation of the profits realized).

[34] See Monetary and Financial Code, Art. L. 621-15 (Fr.), http://tinyurl.com/yjq3v5o.

a common agent or through the auspices of a certified association representing investor interests.[35]

The AMF (directly and through its predecessor, the COB) has long actively cooperated and exchanged information with other markets' supervisory authorities, including the SEC.[36] Notwithstanding such cooperation, the regulatory regimes of the two countries remain different in significant ways. For example, opt-out class actions are considered contrary to the French Constitution and to Article 6 of the European Convention on Human Rights, and, as noted above, France allows civil damages actions for securities violations based on a showing of negligence.

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The above discussion demonstrates that permitting litigation in the United States for securities fraud committed abroad would create the sort of "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" that this Court has consistently refused to countenance. *Empagran*, 542 U.S. at 165. This is plainly a situation where, "even where nations agree about primary conduct," they may still "disagree dramatically about appropriate remedies." *Id.* at 167.

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[35] French Monetary and Financial Code, Art. L. 452-2 (Fr.).

[36] See Mutual Assistance Agreement entered into between the COB and the SEC on 14 December 1989, http://tinyurl.com/ykbjeeu; Agreement entered into between the SEC and the European financial markets supervisory authorities on 25 January 2007 for the purpose of cooperating and exchanging information in relation to the supervision of the financial markets, http://tinyurl.com/yg7l9nx.

Moreover, the plaintiff-friendly provisions of U.S. securities law, including the U.S. class-action mechanism and the enormous recoveries available in U.S. courts,[37] would undoubtedly attract plaintiffs to the United States. And the sheer size of these claims often means that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip Stamps*, 421 U.S. at 740. The threat of costly and disruptive discovery adds an additional "*in terrorem* increment" to the settlement value of even meritless claims. *Id.* at 741 (emphasis added).

Studies confirm that virtually every securities fraud claim that survives a motion to dismiss is settled; few businesses can afford to risk a trial, regardless of the merits of the claim. See Francis J. Menton, Jr., *New Opportunities for Defendants in Securities Class Actions*, (Federalist Soc'y for Law & Pub. Policy Studies 2007), http://tinyurl.com/yhk7wp7 ("[O]nce they have survived pre-trial motions, almost no securities class actions have gone to trial, and virtually all are set-

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[37] Cornerstone's analysis found that the 210 securities class action claims filed in 2008 presented a maximum dollar loss of $856 billion. Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* 12 & 13 (2009), http://tinyurl.com/yl2fp49. Of those claims, ninety-nine settled for an average of over $31 million per settlement. Cornerstone Research, *Securities Class Action Settlements, 2008 Review and Analysis* 2 (2009), http://tinyurl.com/yft5g65. Overall, there were nine settlements in excess of $1 billion from 1999-2008. *Ibid.*

tled."); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (finding that, rather than the merits, the magnitude of a stock-price drop and the amount of insurance are the best predictors of whether suit would be brought and the size of the ultimate settlement).[38]

If Section 10(b) were applied to fraudulent statements, misrepresentations, or omissions made abroad, therefore, the magnitude of the U.S. claim would encourage plaintiffs to circumvent the carefully crafted securities regimes created by other nations and would compel a defendant to settle, regardless of the law or remedy available in the non-U.S. country. That would severely compromise the ability of non-U.S. nations to regulate their domestic security issuers in accord with their domestic policy decisions. U.S. law would effectively trump policy decisions of other nations.

3. The forum non conveniens doctrine is insufficient to preserve comity.

Petitioners' contention that the *forum non conveniens* doctrine can alleviate these substantial comity concerns misses the mark. See Pet. Br. 41-42.

The *forum non conveniens* doctrine is inherently discretionary. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of

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[38] Congress too has recognized that "basic economics" can force defendants to settle "meritless" Section 10(b) class actions that have "only a five percent chance of success" if the defendants are unable to obtain early dismissal. S. Rep. No. 109-14, at 21 (2005).

the trial court."). It turns on the district court's "assessment of a 'range of considerations.'" *Sinochem Int'l. Co.* v. *Malaysia Int'l Shipping Co.*, 549 U.S. 422, 429 (2007) (quoting *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996)). These factors include a broad variety of private and public interests that may be balanced in a wide-variety of ways. See *Piper Aircraft Co.*, 454 U.S. at 257-60.

In practice, the doctrine does not provide a clear rule that will ensure respect for the sovereignty of non-U.S. nations, as well as create the certainty that businesses need when conducting business across borders. See, *e.g.*, *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21 (2d. Cir. 2002) (split decision reversing the district court's grant of *forum non conveniens* dismissal in securities fraud case against Canadian company); *E.ON AG* v. *Acciona, S.A.*, 468 F. Supp. 2d 559, 586-88 (S.D.N.Y. 2007) (despite recognizing that "the epicenter of this dispute is in Spain" and that plaintiffs chose "to litigate in the United States because it perceives that American securities laws may give it a tactical advantage by providing discovery and even relief which it has no reasonable expectation of obtaining in Spain," court refused to dismiss Section 14 claim on *forum non conveniens* basis).

III. THE COURT SHOULD DECLINE TO EXPAND THE IMPLIED PRIVATE ACTION TO ENCOMPASS EXTRATERRITORIAL CLAIMS.

This Court has never held that the judicially-created implied private action under Section 10(b) extends to claims by non-U.S. persons who purchase or sell securities outside the United States or to claims of U.S. persons based on fraudulent statements, misrepresentations, or omissions used or employed outside the United States. Such a holding

would require an extension of the implied cause of action well past its breaking point. Both jurisprudential and practical concerns preclude such a further judicial expansion of this non-statutory cause of action.

1. This Court recently reaffirmed that "[t]he [Section] 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, 552 U.S. at 164. See also *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 358-59 (1991) ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded."). It does not comport with the "settled" principle "that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." *Stoneridge*, 552 U.S. at 164. Because these "[c]oncerns with the judicial creation of a private cause of action caution against its expansion," "the [Section] 10(b) private right should not be extended beyond its present boundaries." *Id.* at 165 (citation omitted).

Stoneridge, accordingly, followed an unbroken line of cases in which this Court has refused to broaden Section 10(b) liability. See, *e.g.*, *Cent. Bank*, 511 U.S. at 164; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Blue Chip Stamps*, 421 U.S. at 723. This Court has never held that Section 10(b) provides a private cause of action to a non-U.S. plaintiff who alleges fraud in connection with the purchase or sale of a non-U.S. security on a non-U.S. exchange, or to a U.S. person whose claim is not based on the use or employment of fraudulent communications within the United States. If such a broad private

cause of action is to be created, Congress—not this Court—should take that step.

Indeed, this understanding of the proper scope of the private cause of action is fully consistent with the aim of the Exchange Act, which, as noted above, protects the "*national* public interest" by safeguarding the "*national* market system for securities." 15 U.S.C. § 78b (Exchange Act) (emphasis added).

2. In addition to the jurisprudential limitations on Section 10(b)'s private cause of action, "the Court has considered [it] appropriate to examine" "[t]he practical consequences of an expansion" of the private right. *Stoneridge*, 552 U.S. at 163. See also *id.* at 164 (a primary concern is whether a liability rule would deter "[o]verseas firms with no other exposure to our securities laws * * * from doing business here").

As we have explained, the adverse practical consequences of Petitioners' proposed rule are substantial. The rule would have a significantly negative impact on the ability of U.S. economy and its capital markets to attract foreign direct investment (see pages 5-7, *supra*), it would drastically undermine non-U.S. nation's attempts to police domestic securities fraud (see pages 18-29, *supra*), and it would severely impair the willingness of non-U.S. governments to cooperate with the SEC (see pages 21-29, *supra*). There is no justification for expanding Section 10(b) civil liability so enormously, particularly where plaintiffs have recourse to the laws of the countries where the fraud actually occurs.

3. Moreover, in determining the scope of the implied private action under Section 10(b), this Court has been cognizant of the difference between the

SEC, cabined by prosecutorial discretion that includes consideration of comity concerns, and the plaintiffs' securities bar, which has no such check and in fact is obliged by its duty of loyalty to its clients to ignore broader societal concerns. *Cent. Bank*, 511 U.S. at 183 (fact that private civil cause of action for aiding and abetting would eliminate check of prosecutorial discretion weighed against allowing such liability); *Stoneridge*, 552 U.S. at 162 (noting that Congress responded to *Central Bank* by allowing SEC, but not private parties, to sue aiders and abettors); cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) (judicial caution in creating a private cause of action under the Alien Tort Statute is warranted, because it entails "permit[ting] enforcement without the check imposed by prosecutorial discretion").

In sum, this Court should not construct an extraordinarily expansive private cause of action that would be inconsistent with settled jurisprudential principles, important policy concerns, and weighty comity interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2010

APPENDIX

APPENDIX A

Note No. 17 / 2010

The Embassy of Switzerland presents its compliments to the U.S. Department of State and has the honor of communicating that Switzerland wishes to draw to the attention of the United States the case *Morrison* v. *National Australia Bank* (No. 08-1191), which is currently pending before the U.S. Supreme Court. The *Morrison* case is a class action lawsuit initiated on behalf of non-U.S. investors in an Australian corporation whose shares trade on an Australian stock exchange. The plaintiffs assert that allegedly fraudulent information was reported by a U.S. subsidiary to its Australian parent, that the Australian parent used the information in preparing its financial reports, and that those reports ultimately misled investors participating in securities transactions in Australia. The plaintiffs argue that the reporting of false data by the subsidiary from the United States to its parent would provide a sufficient basis for a private claim against the Australian parent under Section 10(b) of the U.S. Securities Act of 1934. Both the U.S. District Court and the Court of Appeals for the Second Circuit ruled that the connection between the activities that occurred in the United States and the allegedly fraudulent statements by the Australian parent was too remote to allow a private right of action to proceed under Section 10(b).

Switzerland wishes to highlight two points relating to this case, concerning (i) maintaining judicial limits on the extraterritorial application of U.S. law and (ii) Switzerland's own protections for Swiss investors and investors in Swiss companies.

The extraterritorial assertion of jurisdiction requested by the plaintiffs in this case would be inconsistent with established principles of international law. The United States should not purport to provide civil remedies for alleged securities law violations committed by non-U.S. corporations against non-U.S. persons on non-U.S. securities exchanges. Allowing U.S. courts to assert such extraterritorial jurisdiction under the circumstances of the *Morrison* case would interfere with the sovereignty of foreign nations, which have the right to regulate securities-related activities within their own territory without interference from U.S. civil lawsuits.

As many other nations, Switzerland asserts its own jurisdiction over securities fraud, namely through comprehensive legislation prohibiting securities offenses. Swiss law provides for criminal sanctions for such offenses as insider trading (Penal Code Art. 161), price manipulation (Art. 161bis), and false statements regarding commercial businesses (Art. 152). Both the federal government and the Swiss cantons can prosecute such offenses.

The Swiss Financial Market Supervisory Authority (FINMA) has broad authority to supervise, *inter alia*, stock exchanges, securities dealers and collective investment schemes. Among other responsibilities, FINMA enforces through administrative measures the Federal Act on Stock Exchanges and Securities Trading (SESTA) and prosecutes cases of insider trading, price manipulation and other violations of the Act (SESTA Art. 6). FINMA conducts investigations and has the authority to order injunctive relief, suspend or revoke licenses and confiscate illegal gains from supervised entities. Such orders can be enforced in the federal courts. When there are

grounds for suspecting criminal activity, FINMA is required to refer cases for prosecution (SESTA Art. 35 VI).

Swiss law also provides for private rights of action for financial loss resulting from violations of the duties of corporate managers (Code of Obligations Art. 754). There are specific provisions establishing liability for misleading prospectuses for initial offerings (Art. 752) and misconduct by auditors (Art. 755). Private actions potentially may also be brought as general tort claims based on Code of Obligations Art. 41.

Thus, there is no need to augment the Swiss system through the extraterritorial application of civil remedies under U.S. law. Even more important, providing non-U.S. investors in Swiss companies with a private right of action for securities fraud in U.S. courts may result in conflicting judicial decisions, as U.S. and Swiss law may differ. It is not in the interest of Nations to have different regulations apply to the same case and thus invite plaintiffs to forum shop.

Switzerland notes that there is a long history of mutually beneficial cooperation between the Swiss and United States governments in criminal and administrative investigations and prosecutions of securities law violations. That cooperation has been achieved in a manner that respects the sovereignty and enforcement priorities of both countries. Switzerland reaffirms its view that international mutual assistance is the most effective mechanism for combating instances of genuinely transnational securities fraud schemes.

Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take the necessary steps to encourage the Supreme Court to affirm the results of the decisions of the lower courts in this matter.

The Embassy of Switzerland avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

Washington, D.C., 23 February 2010

United States Department of State
Washington, D.C.

AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors at American law schools[2] who have studied and written about corporate law and securities law, including securities litigation under the private right of action courts have implied in Section 10(b) of the 1934 Securities Exchange Act (the "1934 Act"), 15 U.S.C. § 78j(b) (1988), as well as the express private rights of action otherwise enumerated in the federal securities laws. *Amici* seek to provide this Court with information that will assist it in interpreting the circumstances under which foreign investors who purchased the securities of a foreign issuer in a foreign market should be permitted to bring a civil action for money damages under the implied Section 10(b) private right of action in a United States court.

Amici do not necessarily all agree with all of the particular statements herein, but *Amici* do agree that this Court should affirm the judgment below and that this Court should do so for reasons substantially similar to the reasons set forth in this brief.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] A full list of *Amici*, who joined this brief as individuals and not representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Amici agree with the result of the Second Circuit's holding that the plaintiffs in this case cannot sue National Australia Bank ("NAB") under Section 10(b). *Amici* do not, however, believe the Second Circuit's reasoning was consistent with the legislative intent of Congress when it passed Section 10(b). Instead of the "balancing" tests used by the Second Circuit, *Amici* argue for a crisp "bright line" rule predicated on Congress' intent in adopting the 1934 Act to regulate United States securities markets but not to regulate foreign securities markets. Such a bright line rule would exclude transactions in foreign securities markets from coverage under Section 10(b) and would be consistent with Congressional intent clearly demonstrated in the legislative history. For example, Huston Thompson, a drafter of the Securities Act of 1933 (the "1933 Act"), testified before Congress that the language of the statute meant that "we were not going to attempt to go beyond our own national limits" and that the Act covers foreign securities only if they are "[s]old in this country."[3] Similarly, Representative Wolverton stated that "[t]he great danger is from foreign securities over here. I am trying to provide against that danger."[4] There is no reason to believe that Congress intended a broader jurisdictional reach for the 1934 Act's regulation of trading markets than it did for the 1933 Act's provisions protecting buyers in the United States from unregistered securities and securities sold under false pretenses. The legislative history of the

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[3] *Federal Securities Act, Hearings on H.R. 4314 Before House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. (1933), quoted in Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 700-01 (1990).

[4] *Federal Securities Act, Hearings on H.R. 4314, supra*, quoted in Sachs, *supra*, at 695.

1934 Act contains no statements that suggest any intention to extend the jurisdictional reach of the Act beyond the national limits.

The bright line rule urged by *Amici* comports with this Congressional intent. If adopted by this Court, this bright line rule would provide predictability for transacting parties in the global securities market and avoid burdening United States courts with foreign disputes that are better resolved by the courts of countries involved.

Congress is free to change its intent on this issue if it likes. Indeed, Congress is debating a bill that would do just that. Section 7216 of H.R. 4173 provides for extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors." H.R. 4173, 111th Cong., 2d Sess., § 7216 (2010). Congress also might take the more cautious step of only allowing the Securities and Exchange Commission ("SEC"), but not private plaintiffs, to pursue persons whose conduct in the United States contributes to securities fraud in foreign markets. Another approach would be for Congress to authorize the SEC to decide which foreign countries' securities markets should be protected from conduct within the United States that violates Section 10(b) and then extend extraterritorial application of Section 10(b) to those countries. Alternatively, Congress could do nothing. Unless and until Congress takes further action, this Court should uphold the intent of Congress in 1934 that transactions in foreign securities markets are not within the scope of Section 10(b).

ARGUMENT

I. THE INTENDED BENEFICIARIES OF SECTION 10(B) DO NOT INCLUDE PERSONS WHO PURCHASE OR SELL SECURITIES OUTSIDE OF THE UNITED STATES

A. Only Intended Beneficiaries of a Statute Are Permitted to Sue Under It

The federal securities laws, including the 1933 Act and the 1934 Act, contain several express private rights of action. In these provisions, Congress explicitly provides that specified investors may sue specified persons who commit specified acts in violation of the statute.

The provision at issue in this case, Section 10(b) of the 1934 Act, does not contain an express private right of action. Although it may be doubted that Congress ever intended for there to be a private right of action under Section 10(b), the federal courts nonetheless have implied one in order to further the objectives of the statute. This Court has several times previously defined the scope of this implied private right of action. This Court is now being asked to decide whether the implied private right of action under Section 10(b) is so broad as to include foreign plaintiffs who sue over securities of a foreign issuer that were purchased on a foreign securities exchange.

This Court has altered its approach to implied private rights of action over the years. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court declined to find an implied private right of action in Title VI to the Civil Rights Act of 1964. The Court observed:

> Respondents would have us revert in this case to the understanding of private causes of

> action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975), which itself interpreted a statute enacted under the *ancien regime* and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*'s method for discerning and defining causes of action. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A. [511 U.S. 164] (1994).

Alexander, 532 U.S. at 287 (parallel citations omitted).

Statutes with express private rights of action generally specify who may sue under them. *See, e.g.*, 1933 Act, Sections 11 and 12, 15 U.S.C. §§ 77k(a), 77l. Statutes under which private rights of action have been implied (obviously) do not because courts, not Congress, created these private rights of action. Statutes under which implied private rights of action have been created have intended beneficiaries or persons whom Congress sought to protect. This Court has routinely held that only the intended beneficiaries of a statute should be permitted to sue under an implied private right of action. *See, e.g.*, *Cort*, 422 U.S. at 78; *Piper v. Chris Craft Indus., Inc.*, 430 U.S. 1 (1977) (denying standing to sue under 1934 Act Section 14(e) because plaintiff was not a member of the class for whose benefit the statute was enacted).

When statutes are "silent" as to whether they apply outside the United States, this Court has generally presumed that those statutes apply only

within the United States because "Congress is primarily concerned with domestic conditions." *Foley Bros. v. Filardo*, 336 US. 281, 285 (1949). As explained more fully below, *Amici* do not believe this presumption has been rebutted in the instant case. The legislative history demonstrates that Section 10(b) of the 1934 Act was enacted to protect investors in United States securities markets, not investors in foreign markets. If anybody should be permitted to bring private lawsuits under Section 10(b) – a statutory provision that nowhere mentions a private right of action – the right to sue should be limited to persons who buy or sell in securities markets in the United States.

B. Case Law Applying Section 10(b) to Securities Transactions Abroad Is Based on Erroneous Assumptions That Congress Was Unaware of Foreign Markets and That Congress Would Have Regulated Foreign Securities Transactions If It Had Considered the Issue

Many lower court decisions holding that Section 10(b) applies to securities transactions abroad base their holding on two assumptions: first, Congress was silent on this issue because it did not consider foreign securities markets in 1934; and second, Congress would have wanted the federal securities laws to protect foreign as well as domestic trading markets, and would have expressly said so if it had considered the issue. The historical background of the federal securities laws and their legislative history refute both assumptions.

1. Congress Was Aware of Foreign Markets

The assumption that Congress was ignorant of foreign securities markets, is illustrated by Judge Friendly's opinion in *Bersch v. Drexel Firestone, Inc.*: "[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later." 519 F.2d 974, 993 (2d Cir. 1975). The assumption of Congressional ignorance that underlies this view, however, can only be correct if Congress had ignored facts about global securities markets that were obvious in 1934.

England, not the United States, dominated securities markets up until Word War I. "[T]he London market appropriately received a large share of attention. It was even used as a norm for measuring interest rate levels and trends in other countries." Sidney Homer, *A History of Interest Rates* 328 (1960). By the 1920s, however, the United States had shifted from being the world's largest debtor nation to the world's largest creditor nation. American investors bought and sold large quantities of foreign securities, many of which were risky. Hyperinflation in Germany in 1923 proved devastating for bond holders and anyone else holding assets denominated in Deutschmarks. In November 1923, the interest rate for call money on the Berlin Stock Exchange rose to as high as 30 percent per day. *Id.* at 465. The financial crisis precipitated in the United States in 1929 was mirrored by a financial crisis in Europe precipitated by the insolvency of Creditanstalt in Austria in 1931. *Id.* at 404. As discussed below, American investors lost large sums of money in European securities markets and suffered devastating losses in Latin American securities markets as well. Congress did not need to foresee (as Judge Friendly asserted in *Bersch*) "the development of offshore funds thirty years later." The legislative record establishes that Congress

discussed at length the money American investors had lost offshore and that Congress took specific steps to address those losses.

Professor Margaret Sachs correctly points out that there is abundant legislative history demonstrating that "the Congress that enacted the 1933 and 1934 Acts was well aware of international securities markets." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 691 (1990). *See also* Louis Loss, *Securities Regulation* 236-44 (1951); I Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 300-01 (2006) (describing Congressional hearings on losses Americans suffered in foreign securities); Joel Seligman, *The Transformation of Wall Street* 7-8, 10, 11, 18-19, 27-28, 68-69, 70 (rev. ed. 1995) (discussing intense political controversy in Congress and the Executive Branch during the early 1930s over foreign securities sold in the United States).

In 1930, the Commerce Department noted "the enormous absorption of foreign capital issues by the American public" and that "increasing attention to such issues has been required by bankers, businessmen, investors and students of international finance." Commerce Dep't, *Handbook on American Underwriting of Foreign Securities* 1 (1930), quoted in Sachs, *supra*, at 693. From 1923 to 1930, investors in the United States had purchased approximately $6.3 billion in foreign bonds. I Loss, Seligman & Paredes, *supra*, at 299, citing S. Rep. No. 1455, 73d Cong., 2d Sess., 89 (1934). Leading investment banks persuaded investors to exchange Liberty Bonds for higher yielding foreign bonds. I Loss, Seligman & Paredes, *supra*, at 299. In March 1932, Senator Hiram Johnson reported that bonds of 16 European countries were trading at 57 percent of their par value. *Id.* at 299-300, citing 75 Cong. Rec. 6055 (1932). Losses in Latin America were even worse. As of December 31, 1931, the aggregate

market value of bonds from 14 Latin American countries was 26 percent of their face value. Peruvian bonds had a market value of 7 percent of face value. *Id.* at 300, citing 75 Cong. Rec. 6057 (1932).

The Senate in December 1931 held hearings on the sale of foreign securities in the United States. Those hearings focused on high commissions that investment banks earned selling foreign bonds and competition among investment banks to market those issues. Many of these bond issues had serious disclosure problems. *Sale of Foreign Bonds or Securities in the United States Pursuant to S. Res. 19, Hearings Before Senate Comm. on Finance*, 72d Cong., 1st Sess. 226, 615-22, 743, 1273-74, 1356 (1931-32), and Speech of Senator Hiram Johnson at 75 Cong. Rec. 6052-62 (1932) (concerning the hearings), cited in I Loss, Seligman & Paredes, *supra*, at 300-01.

The 1932-34 Stock Exchange Practices hearings also addressed the failure by United States underwriting banks to disclose risks in Latin American bonds. National City Company's own representatives in Peru had warned the bank that no further loans could be safely made to Peru, but National City did not communicate any of these concerns to investors. *See* S. Rep. No. 1455, 73d Cong., 2d Sess., 126-31 (1934), cited in I Loss, Seligman & Paredes, *supra*, at 301. Testimony revealed that foreign bonds had been issued "with little expectation of redemption, and were sold by the American financiers to make outrageously high profits." S. Rep. No. 20, 73d Cong., 1st Sess., 2 (1933), cited and quoted in Loss, *supra*, at 241-42; *see also* H.R. Rep. No. 974, 73d Cong., 1st Sess. (1933), cited in Loss, *supra*, at 242.

Federal securities laws were necessary, a Senate report concluded, because "billions of dollars have been invested in practically worthless securities, foreign and domestic, including those of foreign

governments, by the American public through incomplete, careless or false representations." S. Rep. No. 47, 73d Cong., 1st Sess. (1933), quoted in Sachs, *supra*, at 694. Senator Fletcher's Report on Stock Exchange Practices also stated that regulation of investment bankers was justified in part because they had "indulged in practices of doubtful propriety in the promotion of foreign loans and in the sale of foreign securities to the public." Senate Comm. on Banking and Currency, Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934), quoted in Sachs, *supra*, at 694-65. Likewise, during hearings on the 1933 Act, Representative Wolverton stated that "[t]he great danger is from foreign securities over here. I am trying to provide against that danger." *Federal Securities Act, Hearings on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. (1933), quoted in Sachs, *supra*, at 695.

Congress had every reason to protect United States investors from fraud by foreign issuers. Generally applicable language in the 1933 and 1934 Acts clearly extends to foreign as well as domestic securities bought and sold in the United States; there is no exemption for foreign securities sold here. *See, e.g.*, 15 U.S.C. § 77b(a)(7); 15 U.S.C. § 78c(a)(17); Sachs, *supra*, at 699-701. Section 8(a) of the Securities Act originally had a shorter 7 day waiting period "in the case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States." Loss, *supra*, at 238 n.315. This provision was removed in the 1940 amendment that authorized the SEC to shorten the 20 day waiting period. *See id.* Congress thus expressly addressed securities of foreign issuers sold into the United States and/or traded in the United States, and decided that they would be subject to our securities laws.

Congress also specifically addressed the plight of United States investors holding foreign debt securities. The Johnson Act, adopted in 1934, imposed criminal liability on any person who within the United States sold the bonds, securities or other obligations of a foreign government issued after 1934 while that government was in default in the repayment of its obligations to the United States. 48 Stat. 574 (1934), 31 U.S.C. § 8042, reenacted in the criminal code at 18 U.S.C. § 955 (1948), cited in Loss, *supra*, at 241 & n.324. A Congress oblivious to the impact of offshore markets on Americans could not have enacted such a law.

The Foreign Bondholders Act of 1933 allowed the President to bring into being a special corporation to negotiate and file suit on behalf of holders of defaulted foreign securities "issued sold or owned in the United States." 15 U.S.C. § 77ee(8). The President did not issue the proclamation envisioned by the Foreign Bondholders Act, and the corporation specified therein never came into being. Instead, at the suggestion of several members of President Roosevelt's cabinet, private parties in 1933 organized the Foreign Bondholders Protective Council. This nonprofit corporation was modeled on the 1868 Council of the Corporation of Foreign Bondholders in England. A White House press release stated: "The Government realizes a duty, within the proper limits of international law and international amity, to defend American interests abroad. . . . It would not be wise for the Government to undertake directly the settlement of private debt situations." Foreign Bondholders Protective Council Inc., Ann Rep. 6 (1945), cited and quoted in Loss, *supra*, at 240 & n.321.

Congress thus was concerned about Americans' losses in foreign bonds, but Congress also knew that intervention in foreign securities markets on behalf of American investors would have important foreign policy implications. President Roosevelt allowed

investors and issuers to resolve these problems on their own, with the proviso that going forward all foreign securities and all domestic securities sold or traded in the United States would be subject to the United States' securities laws.

2. Congress Did Not Intend to Regulate Foreign Securities Transactions

Some courts have assumed that Congress would have wanted the 1934 Act to reach securities fraud outside as well as inside the United States. For instance, Judge Friendly and the Second Circuit framed the "effect" test and the "conduct" test to address international application of Section 10(b). The effect test looks to the effect of a defendant's statements on United States investors [5] – for example, if a foreign issuer's securities are traded on a United States exchange, Section 10(b) presumably allows those investors to sue even if misleading statements are made abroad. When, however, the converse is true – conduct occurs inside the United States that injures investors outside the United States – Judge Friendly used the "conduct test" to find subject matter jurisdiction in those cases as well. In *ITT v. Vencap Ltd.*, Judge Friendly observed that the United States should not be "used as a base for manufacturing fraudulent securities devices for export, even when they are peddled only to foreigners," because "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." 519 F.2d 1001, 1017 (2d Cir. 1975).

To be sure, a Congress with a strong internationalist agenda *might* decide to apply federal securities laws in the manner described by Judge

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[5] *See, e.g., Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *modified en banc*, 405 F.2d 215 (2d Cir. 1968).

Friendly. Saving the world from the many threats to economic and political stability in the 1930s, including securities fraud, might have been a noble objective for Congress to undertake.

Congress did not do so. Instead, throughout the 1930s, Congress focused on the United States' problems rather than other countries' problems and in many areas stood by silently while other countries did or did not work out their problems. Congress was well aware of economic and political troubles in Europe, Latin America and Asia in the 1930s. Congress took a hard line in refusing to accommodate other countries that might find it difficult to comply with United States securities laws; unlike the English Companies Act, the 1933 and 1934 Acts made no exception for securities sold here by foreign governments. *See* Sachs, *supra*, at 698 & n.110.

Congress also was aware of the practical limits of its regulatory reach, particularly when the United States was a follower rather than a leader in the regulation of securities. The Securities Act followed "several centuries of legislation in England." Loss, *supra*, at 3 (citing a statute of Edward I on licensing of brokers in the City of London and a 1697 statute of Parliament to restrain "the number and ill practice of stock jobbers"). The English Companies Act of 1900 was strengthened by the Companies Acts of 1907 and 1928 before Congress passed the federal securities laws, which were modeled in large part on that Act. *Id.* at 6, 82. Germany enacted a corporate law in 1931. France had a national corporate law that was amended several times after 1929. *Id.* at 74. The United States – which had failed to regulate its own markets in the years leading up to the Great Depression – was in no position to tell other countries how to regulate their markets.

The legislative history of the 1933 Act and the 1934 Act, the text of the Acts themselves, as well as other contemporaneous acts of Congress, show

abundant evidence that Congress "chose to extend the benefits of the 1933 and 1934 Acts only to those investors whose trades occur in the United States." Sachs, *supra*, at 721.

First, as discussed above, the legislative history demonstrates that Congress explicitly stated its intent to protect domestic traders in foreign securities. *See* Point I.B.1 *supra*. The legislative history included a detailed chart of purchases by American investors of foreign securities in the United States but no such detail about trading in foreign markets of United States securities or foreign securities. *See* Sachs, *supra*, at 696-97. Petitioners correctly note that "the Exchange Act included a Congressional finding that 'prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries.'" Pet. Br at 39, citing 15 U.S.C. § 78b(2). This finding shows that Congress understood the importance of foreign markets. Petitioners do not, however, point to any evidence in the legislative history that Congress sought to use the generally applicable provisions of the securities laws to regulate securities prices or any other aspect of securities trading taking place in foreign countries.

Second, the definition of "interstate commerce" in the 1934 Act was intended, as it was intended in the 1933 Act, to reach only commerce between states or between a foreign country and one of the states. Both Acts apply to securities involved in "interstate commerce," which is defined as trade, transportation, communication, or commerce in securities "among the several States" or "between any foreign country and any State." *See* 15 U.S.C. § 77b(a)(7); 15 U.S.C. § 78c(a)(17).

The legislative history indicates that "between any foreign country and any State" was intended to cover transactions in foreign securities inside the United States, not transactions outside the United States.

In an exchange between Huston Thompson, a drafter of the 1933 Act, and Representative Wolverton, Mr. Thompson insisted that the language of the statute meant that "we were not going to attempt to go beyond our own national limits" and that the Act covers foreign securities only if they are "[s]old in this country":

> Rep. WOLVERTON: This act is drawn to regulate commerce in securities, both interstate and foreign, is it not?
>
> Mr. THOMPSON: Interstate commerce. We struck out the words "foreign commerce."
>
> Rep. WOLVERTON: Does it not have that effect where we are dealing with foreign securities?
>
> Mr. THOMPSON: Sold in this country, yes. It is different from the Federal Trade Commission Act in this: For example, the Federal Trade Commission's jurisdiction extends down to Mexico. It goes beyond this country. If two of our nationals go down to Mexico and start a business, the jurisdiction of the Federal Trade Commission attaches. We have limited this bill to the United States and its territories.
>
> * * * *
>
> I limited it to sales within the United States and its Territories. In other words, we were not attempting to go beyond our national limits . . . .

Federal Securities Act, Hearings on H.R. 4314 Before House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933), quoted in Sachs, *supra*, at 700-01.

There is no basis to conclude that Congress intended a broader jurisdictional reach for the 1934 Act's regulation of trading markets than it did for

the 1933 Act's provisions protecting buyers in the United States from unregistered securities and securities sold under false pretenses. The legislative history of the 1934 Act contains no statements that indicate any intention to extend the jurisdictional reach of the Act beyond the national limits. *Amici* Alecta Pensions *et al.* quote a conference committee report stating that Congress intended the Exchange Act to "provide for the regulation of securities exchanges and over-the-counter markets operating in interstate and foreign commerce and through the mails to prevent inequitable and unfair practices on such exchanges and markets." Brief for *Amici Curiae* Alecta Pensionsforsakring *et al.* at 10, quoting H.R. Rep. No. 78-1838 (Conf. Rep.), 1934 WL 1291 (May 31, 1934). All this means is that securities exchanges and over-the-counter markets in the United States were "operating in interstate and foreign commerce" and Congress intended to regulate them. There is not even a hint in this language or elsewhere in the legislative history that Congress intended to "provide for the regulation" of the London Stock Exchange, Australian stock exchanges, or other foreign markets.

Third, the registration provisions of the 1933 Act illustrate the limited jurisdictional reach of the federal securities laws. The 1933 Act requires that foreign securities sold to investors in the United States be registered. *See* 15 U.S.C. § 77f-j (registration and disclosure provisions applicable to foreign as well as domestic issuers). The 1934 Act prescribes virtually identical treatment of foreign and domestic issuers subject to its reporting requirements. *See, e.g.*, 15 U.S.C. § 78l-m. If, however, United States issuers sell their securities only to foreign investors, the 1933 Act does not require registration and has for decades been interpreted by the SEC not to require registration. *See* SEC Regulation S, 17 C.F.R. § 230.901 (exempting from registration an offer or sale "that occurs outside the United States"); Offshore Offers

and Sales, Securities Act Release No. 6863, 55 Fed. Reg. 18306 (promulgating Regulation S).

Congress could have explicitly extended protection to foreign traders from conduct here in the United States by requiring United States issuers to register their securities before selling them abroad. Presumably, if Congress had been concerned about using the securities laws to protect investors in foreign markets, it would have done so. Congress did not do so in 1933 or 1934, and has for years allowed the SEC to exempt securities sold exclusively abroad from registration. It would be odd that the same Congress that declined to require registration of securities sold abroad by Americans would want Section 10(b) to be used by private plaintiffs to sue over other securities purchased or sold abroad.

Fourth, there were extensive colloquies in Congress over personal jurisdiction across international boundaries. These colloquies focused on the procedural problem of asserting personal jurisdiction over foreign defendants who perpetrated fraud in United States markets. *See* Sachs, *supra*, at 705-06. Congress was concerned that under the then current pre-*International Shoe* personal jurisdiction law, established by *Pennoyer v. Neff*, 95 U.S. 714 (1877), foreign traders had to enter the United States in order for courts to have personal jurisdiction over them. While Congress discussed in detail the trouble that domestic traders would have obtaining personal jurisdiction over foreign defendants, none of these colloquies concerned assertion of personal jurisdiction over persons who perpetrated fraud on foreign markets. Sachs, *supra*, at 705-06. Had this been a concern relevant to the 1933 and 1934 Acts, Congress could and would have addressed it.

Fifth, the Foreign Bondholders Act, discussed above, extends its protection to holders of defaulted foreign securities "issued, sold or owned in the

United States." 15 U.S.C. § 77ee(8). This language does not protect foreign traders in those bonds or even Americans who purchase foreign securities abroad while living abroad and then do not return to the United States. Congress could have applied the Foreign Bondholders Act to securities bought and sold abroad and owned abroad, but did not do so.

Sixth, Congress declined to extend protection in the 1934 Act to persons who buy and sell securities outside the United States even though this Court in 1925 explicitly held that extraterritorial effect would not be given to statutes that did not explicitly provide for extraterritorial application. *See N.Y. Cent. R.R Co. v. Chisholm*, 268 U.S. 29, 31 (1925) (declining to infer extraterritorial effect to the Federal Employers' Liability Act). Congress would not have simply overlooked such a significant question when this Court had so recently articulated a strong presumption against extraterritorial application of federal statutes.

Despite this overwhelming evidence that Congress intended that Section 10(b) not apply to trades taking place outside of the United States, some courts refuse to apply such a bright line rule. These courts have ignored Congressional intent and have instead balanced the foreign and domestic elements in each case to determine if plaintiffs may sue in United States courts. *See, e.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977); *Bresch*, 519 F.2d at 986-87; *In re Alstom S.A. Sec. Litig.* 406 F. Supp. 2d 346 (S.D.N.Y. 2005); *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003).

The approach in this caselaw is wrong because Congress' intended beneficiaries in Section 10(b) do not include persons who purchase or sell securities outside the United States. This Court should apply the bright line rule that Congress intended.

C. Congress Addressed Its Limited Concerns About Foreign Securities Markets in Section 30 of the 1934 Act

Congress addressed the international application of the 1934 Act in Section 30 of the Act, which provides:

> (a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security *the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States*, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title.
>
> (b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

15 U.S.C. § 78dd(a)-(b) (emphasis added).

Section 30(a) applies to transactions outside the United States in the securities of issuers from inside the United States in circumstances where those transactions would otherwise evade the Act, and the SEC promulgates rules to prevent such evasion. The presumption clearly set forth in Section 30(b) is that

the Act does not ordinarily apply to transactions abroad. Section 30(a) recognizes, however, that some transactions abroad in United States issuers might be deliberately structured to evade the Act unless the SEC prohibits them. This statutory structure is entirely sensible because almost all United States issuers are traded in the United States if they are traded abroad. Section 30(a) thus aims at market manipulation and other conduct abroad that can have a direct impact on investors in the United States. Without Section 30(a), for example, there would be little point in regulating manipulation of a security's price on the New York Stock Exchange if the same security is listed in London and it can be manipulated there. In this situation, conduct abroad harms United States investors, and Congress gives the SEC the power to prevent it.

Section 30(a), however, does not authorize the SEC to regulate transactions outside the United States in securities of issuers that are also outside the United States. If Section 30(a) had been intended to authorize the SEC to promulgate rules regulating transactions in securities of issuers outside the United States, it would have said "of any issuer" instead of "the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States." If Section 30(b) had been intended to give the SEC license to regulate transactions in the securities of foreign issuers in foreign securities markets, this language limiting Section 30(a) to securities of domestic issuers would be meaningless.

II. CONGRESS' INTENT IN 1934 TO ESTABLISH A BRIGHT LINE RULE EXCLUDING FOREIGN TRANSACTIONS IS EVEN MORE IMPORTANT TODAY

A. There Are Compelling Policy Reasons to Exclude Foreign Transactions from Coverage Under Section 10(b)

The approach Congress settled on in 1934 – that Section 10(b) should extend only to purchases and sales of securities taking place within the United States – is still the correct approach today.

First, applying Section 10(b) only to securities transactions within the United States provides a clear rule for subject matter jurisdiction. Issuers, investors, and courts will then know with precision whether United States securities laws apply.

By contrast, the "conduct" and "effect" tests applied by the Second Circuit are uncertain and unpredictable. The distinction between "preparatory" conduct and "substantial" conduct illustrates the confusion engendered by the conduct test in practice. The Second Circuit may have been correct that NAB's alleged conduct in the United States was at most "preparatory" to the alleged securities fraud and that a "substantial" component of the alleged fraud itself took place in Australia. However, what constitutes "preparatory" conduct and "substantial" conduct under the facts of any particular case is necessarily determined by a court on an *ad hoc* basis, and therefore litigants face great "difficulty in predicting the application of the conduct test." *See* Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 Wis. L. Rev. 465, 492. Furthermore, the distinction between "preparatory" and "substantial" conduct collapses if there is a showing that the "preparatory" conduct

was also a "substantial" step in the alleged fraud. In short, the test used by the Second Circuit does not come close to the clarity that issuers and investors should expect from our legal system. *See id.* As Professors Choi and Silberman conclude, "the amount and importantly the qualitative type of conduct that must occur in the United States to trigger the conduct test is uncertain." *Id.*

Professor Buxbaum also has explained that "the conduct test may reach conduct that affects neither U.S. market conditions nor the financial interests of U.S. investors." Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Juridictional Conflict*, 46 Colum. J. Transnat'l L. 14, 24 (2007). "This expansive interpretation of the conduct test has led to considerable fragmentation and complexity in subject matter jurisdiction jurisprudence." *Id.*

Equally uncertain and unpredictable is the inquiry into the reasonableness of an exercise of jurisdiction that courts often undertake in those cases where they have decided that jurisdiction is permitted because the "conduct" or "effect" test was met. Courts sometimes base such a "reasonableness" inquiry on a range of "all relevant factors" mentioned in the *Restatement (Third) of the Foreign Relations Law of the United States* § 403(2) (1987). A court, for example, might consider whether foreign jurisdictions will recognize U.S. judgments so a prevailing defendant will not be subject to a multiplicity of suits and/or whether the plaintiff has access to alternative remedies abroad. *See* Choi & Silberman, *supra*, at 477 (discussing cases applying these criteria). Each of these factors involves judicial speculation regarding the implementation of the assertion of jurisdiction. Finally, the doctrine of *forum non conveniens* leads courts to take some cases and not others. *See id.* at 478 (discussing how courts might use forum non-conveniens in transnational securities fraud cases).

Thus, once the uncertain and unpredictable "conduct" and "effect" tests have been applied to determine if the court may exercise subject matter jurisdiction, there is another layer of uncertain and unpredictable analysis as the court determines whether it should exercise jurisdiction. Such an approach to jurisdiction in securities suits is not only indeterminate, but it is also unnecessary. United States courts have the better alternative of simply abiding by the Congressional intent, which is to presume no subject matter jurisdiction over Section 10(b) cases when foreign investors buy or sell securities outside the United States.

Second, the bright line rule chosen by Congress also allows legislatures and courts of other countries to decide how to protect investors within their borders. As this Court observed in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004), allowing federal subject matter jurisdiction over foreign injuries that were independent of domestic injuries would be "an act of legal imperialism." The United States should not impose its laws on foreign countries. Federal courts should particularly not do so when Congress has not authorized it.

Third, the instant case involves class action litigation, an area where United States law is both unique and controversial. *See e.g.* Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (2009) (identifying problems with the class action litigation system, including lack of strategic decision-making or even knowledge of the litigation by class members, and questioning whether the United States class action system may rescind individuals' rights to seek redress for their injuries). The United States is unusual in allowing contingent fees, requiring each party to bear the costs of litigation regardless of who wins, requiring class members to opt out, and other aspects of class actions. Most other countries have

made other choices. In securities class actions, the United States allows plaintiffs to proceed on the basis of the "fraud on the market theory" rather than requiring plaintiffs to prove actual reliance on misleading information. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). This approach has been rejected in most other countries *See* Buxbaum, *supra*, 46 Colum. J. Transnat'l L. at 61.

Class actions involving all or mostly foreign plaintiffs also give rise to unique difficulties with class certification under Federal Rule of Civil Procedure 23 and identification of a lead plaintiff as required by the Private Securities Litigation Reform Act of 1995. *See* Choi and Silberman, *supra*, at 479 (discussing these difficulties). The SEC itself has suggested that securities class actions present unique considerations and that "a more jurisdictionally restrictive standard may be warranted in the class action context." Brief of the Securities Exchange Commission as *amicus curiae* in *Morrison v. Australia National Bank* in response to the court's request at 4, n.1, 547 F.3d 167 (2d Cir. 2008).

Class action litigation is therefore an area where it is particularly important that the United States allow other countries to make their own law. Other countries have made different decisions about the tradeoffs in substantive law and procedural law between the interests of plaintiffs or defendants in class action litigation. Other countries reject class action litigation entirely because they believe that it is too expensive, encourages frivolous litigation, does not deter securities fraud, allows plaintiffs to sue without showing they actually relied on defendant's misleading statements, or for other reasons. *Amici* do not endorse any particular view of the United States class action system, but *Amici* recognize that not every country in the world wants a class action litigation system like ours or wants its securities markets subject to one. *Amici* believe that other

nations should make this choice for themselves and not have the United States make it for them.

B. Application of Section 10(b) to Foreign Securities Sold in the United States Would Adequately Deter Transnational Securities Fraud and Accomplish the Objectives of the Act

It is also unnecessary to grant foreign purchasers of foreign securities on foreign exchanges a private right of action under Section 10(b) in order to provide recovery for transnational fraudulent conduct that contains a component of conduct that occurs in this country. If there were actionable securities fraud on the part of a foreign issuer in such a case, a suit by the purchasers who bought the same security or American Depository Receipts in the United States would provide for recovery in a matter consistent with Congressional intent. Adding foreign investors who purchased foreign securities abroad to the plaintiff class would simply expand the class of claimants beyond the group of persons whom Congress intended to protect under the 1934 Act.

Indeed, including securities bought outside the United States in a plaintiff class could skew incentives of plaintiffs' lawyers in a direction that weakens deterrence of fraud harming investors inside the United States. The most successful plaintiffs' lawyers generally pursue cases with the largest aggregate damages, and it could be more attractive to file suit against a large foreign issuer with a relatively small United States trading presence than against an issuer with more securities traded in the United States but lower aggregate damages. When aggregate damages claimed in a suit are not proportional to losses by United States investors, litigation resources will not likely be devoted to fraud most likely to harm United States investors. *See* Choi & Silverman, *supra*, at 494-95 &

n.124. American lawyers will instead devote an increased percentage of their resources to being private attorneys general for world markets.

Moreover, many foreign jurisdictions (including, notably, Australia) also deter securities fraud by enacting laws to protect buyers and sellers of securities in transactions within their borders. Persons can choose the protection of the United States securities laws by buying or selling foreign securities in the United States. Likewise, foreign issuers whose securities are bought and sold in the United States have subjected themselves to United States securities laws. The result is a fair, predictable application of the law.[6]

C. The Material and Significant Conduct Test Urged by the SEC and the Solicitor General Is Unclear and Unpredictable

In urging this Court to deny the petition for certiorari in this case, the SEC and the Solicitor General suggested a two-fold approach that purports to lend some clarity to this area of the law. Under that approach, when a foreign plaintiff in a private Section 10(b) suit "alleges that he was injured outside the United States by transnational securities fraud," he "should be required to prove that his loss resulted not simply from the fraudulent scheme as a whole, but directly from the component of the scheme that occurred in the United States." *See*

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[6] Courts have allowed investors and issuers to choose the legal regime that applies to transactions in circumstances where the transaction has ties to the United States that are significantly stronger than the transactions in NAB securities at issue here. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1294-95 (9th Cir. 1998) (rejecting plaintiffs' contention that suit against Lloyd's should be litigated in U.S. under the federal securities laws despite "choice clause" in contract binding the parties to proceed in England under English law).

Brief for the United States as *Amicus Curiae* (submitted October 2009) at 14. In addition, as a threshold matter, in order for there to be a violation of Section 10(b), the conduct in the United States that allegedly forms part of the fraudulent transnational scheme should be "significant conduct" that is "material to the fraud's success." *Id.* at 13.

Petitioners' brief suggests that the materiality inquiry would ensure that the domestic conduct was an "integral link" in the chain of events in the transnational fraud leading to the foreign investors' losses. Pet. Br. at 32. This inquiry, however, appears entirely open ended and presumes that, at the earliest stage of the litigation, the court has access to information that may require extensive fact-finding. It may be appropriate to use such a test after a full trial on the merits, but it is impractical to require that a court make such a determination at the outset of the litigation. In *Mills v. Electric Auto Lite*, 396 U.S. 375, 384-85 (1970), for example, this Court held that for proxy fraud to be actionable under Section 14(a) of the 1934 Act, it must be an "essential link" in the plaintiffs' transaction. Such, however, is a heavily fact-based determination best made at trial. Making such a determination at the jurisdictional phase of a case is a task that this Court should not foist upon the lower federal courts.

The "significant conduct" requirement is even worse, calling for a sufficient quantum of conduct to occur in the United States to warrant application of the 1934 Act. How much is a sufficient quantum of conduct? This is a regurgitation of the "conduct" test used in the Second Circuit, which commentators have rightly criticized as unpredictable. *See* Choi & Silberman, *supra*, at 492.

Investing and raising capital should not be a guessing game; issuers and investors should know in advance whether one country's laws apply or another country's laws or both. The "effect" and "conduct" tests of the Second Circuit do not provide the needed

certainty. The material and significant conduct test does not make this "balancing" approach any better.

D. Allowing Traders in Foreign Markets to Sue Under Section 10(b) Will Burden United States Courts and Make the United States a Venue for Global Securities Litigation

Allowing investors who purchase their securities abroad to sue under Section 10(b) will import into the United States securities litigation that should be heard in other countries. United States courts will become the arbiters of disputes between foreign investors and foreign companies over securities purchased in foreign markets. Even the remotest connection of an alleged fraud with "conduct" in the United States will invite commencement of suit here, and an unpredictable "balancing test" for determining subject matter jurisdiction will make it uncertain how long a suit will remain in our courts.

Lawyers in the United States may benefit from such "securities litigation tourism" just as lawyers in the United Kingdom have benefited from "libel tourism" there in which aggrieved parties around the world take advantage of expansive United Kingdom libel laws. It is unlikely, however, that turning a single country into a global litigation mill for a particular subject matter – whether securities law or libel law – enhances that country's role in the world economy.[7] The fact that this function is

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[7] International commentators have expressed concern with the "long arm" of United States capital markets law. *See, e.g.*, Sascha Lotze, US-amerikanisches Kapitalmarktsrecht und Internet, 2002, at 78; Peter Versteegen, in: Kölner Kommentar zum WpÜG, 2003, § 24 WpÜG, at 34; Rainer Süßmann, in: Geibel/Süßmann Kommentar zum WpÜG, § 24 WpÜG, at 8. Foreign issuers are sued in the United States by plaintiffs looking for more favorable substantive or procedural law than

foisted upon the world by unilateral action of a country's courts is also unlikely to foster good will among nations. *See generally* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 304-05 (2006) (concluding that "expanding the use of civil litigation in U.S. courts to serve global regulatory goals is highly problematic from an international relations point of view"). The likely result is a weakening of international cooperation in many areas, including deterrence of securities fraud. For United States courts to affect United States foreign relations so significantly without any authorization from Congress is even more difficult to justify.

Litigation tourism is also a game that other countries can play at our expense. Global communication networks such as the Internet make it possible to establish a connection, however tentative, between just about any type of conduct and a particular country. If a "balancing standard" for subject matter jurisdiction is the appropriate measure for deciding whether a country's courts should get involved in a dispute, we should not be surprised to see such "balancing" done by other nations' courts in cases brought against United States citizens. If this Court endorses such an approach, the United States will have no legitimate ground to complain.

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that available in their home countries. *See, e.g.*, Christof Aha and Jens Föderer, Die Roche – Entscheidung des U.S. Court of Appeals, 6 RIW 450, 451 (2003) (citing U.S. suits involving DaimlerChrysler, Deutsche Bank, Deutsche Telekom and Bayer). Forum shopping by foreign plaintiffs may result from a tendency in the United States towards higher judgments and settlements, as well as the possibility for derivative suits and class actions. *Id.* Forum shopping and the extraterritorial application of United States law also create legal uncertainty for foreign issuers. *Id.* at 458.

E. Congress Can Change Its Mind

Congress is free to change the limited jurisdictional scope that it settled upon in 1934 if it wants to do so, and is now debating a bill that would do just that. Section 7216 of H.R. 4173 provides for extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors." H.R. 4173, 111th Cong., 2d Sess., § 7216 (2010). If this bill is enacted, "the United States could become a magnet for global class actions." John C. Coffee, Jr., *High Court and Congress on a Collision Course*, Nat'l L.J., Jan. 18, 2010. This is, however, a choice for Congress and not this Court.

Alternatively, Congress could articulate a version of the "conduct test" that defined when there is a United States interest in having United States law applied to foreign securities transactions and then direct courts to apply that test. *See* Buxbaum, *supra*, 46 Colum. J. Transnat'l L. at 59 (such an approach "would account for the realities of the global marketplace and take seriously the need to address cross-border securities fraud. It would not, however, be easy to implement."). Once again, this is a choice for Congress and not this Court.

Congress also might take the more cautious step of only allowing the SEC, but not private plaintiffs, to pursue persons whose conduct in the United States contributes to securities fraud in foreign markets (this is exactly what Congress did in 1995 to allow the SEC to sue aiders and abettors of securities fraud after this Court's holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that aiders and abettors could not be sued by private plaintiffs under Section 10(b)).

Another approach would have Congress authorize the SEC to decide which foreign countries' securities markets should be protected from conduct within the United States that violates Section 10(b) and then extend extraterritorial application of Section 10(b) to those countries. *See* Choi & Silberman, *supra*, at 468 (proposing such an approach).

Alternatively, Congress could do nothing. Doing nothing would allow other countries to decide how best to protect their securities markets while we protect ours.

Unless and until Congress takes further action, this Court should uphold the intent of Congress in 1934 that transactions in foreign securities markets are not within the scope of Section 10(b).

CONCLUSION

Amici respectfully submit that the Court should affirm the result reached by the Second Circuit and establish a bright line rule limiting the application of Rule 10(b) to securities bought or sold in the United States.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* MN SERVICES VERMOGENSBEHEER B.V., SCOTTISH WIDOWS INVESTMENT PARTNERSHIP LIMITED, AND NORTH YORKSHIRE PENSION FUND, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Where a foreign-based issuer of securities—that both conducts substantial business in the United States and chooses to list its securities on the New York Stock Exchange so that it will be subject to the federal Securities Exchange Act's periodic reporting requirements—files fraudulent financial statements with the U.S. Securities and Exchange Commission incorporating false information generated by American citizens at the issuer's Florida-based U.S. subsidiary, does the Securities Exchange Act of 1934 afford federal subject-matter jurisdiction over claims filed by foreign investors injured by a transnational fraud originating from the United States?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Plaintiffs-Appellants and Petitioners: Russell Leslie Owen and Brian and Geraldine Silverlock, residents of Australia and Robert Morrison, a resident of the United States.

Defendants-Appellees and Respondents: National Australia Bank ("NAB"); Frank Cicutto, an officer of NAB during the relevant time period; HomeSide Lending, Inc. ("HomeSide") a Florida-based subsidiary of NAB; and Hugh Harris, Kevin Race and W. Blake Wilson, officer of HomeSide during the relevant time period.

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BRIEF OF *AMICI CURIAE*

IDENTITY AND INTEREST OF *AMICI* [1]

Mn Services Vermogensbeheer B.V. is a Dutch firm authorized by the Netherlands Authority for Financial Markets to act as an investment and financial-asset manager. Mn Services has 60 years of experience administering pension funds and managing institutional investors' assets. With more than 600 employees, Mn Services currently administers the pension accounts of more than a million people in the Netherlands, and manages assets of approximately €80 billion for its clients. In that capacity, Mn Services is intimately familiar with the workings of international securities markets, and has an interest in their efficient and honest operation, and in the ability of investors outside the United States to recover losses suffered from transnational securities frauds originating from the United States.

Scottish Widows Investment Partnership Limited is among Europe's largest asset-management companies, managing funds worth over £140 billion for a wide range of United Kingdom and international clients—including investment trusts, charities, financial institutions, individual investors, and corporate and local-government pension funds. Its

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[1] The parties consented to the filing of this *amicus* brief by filing, on December 16 and 17, 2009, blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part. No party or its counsel made any contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or printing of this brief.

parent company, Lloyds Banking Group plc, is a leading United Kingdom financial-services group. Scottish Widows Investment Partnership Limited invests in all major asset classes—including United Kingdom and overseas equities and debt securities. Both under its own name, and in partnership with local organizations, Scottish Widows Investment Partnership Limited has a presence that stretches from the United Kingdom and continental Europe to the United States and the Far East. This international dimension heightens its awareness of global investment issues and enhances its ability to manage client relationships on a global basis. The worldwide markets in which Scottish Widows Investment Partnership Limited invests, its international client base, and the geographic spread of its business operations, all reflect the truly global nature of its interest in ensuring the honesty and integrity of any and all securities markets in which it trades, and in the ability of international investors to recover when securities fraud emanates from the United States.

North Yorkshire Pension Fund, an English pension fund organized under the United Kingdom's Local Government Pension Scheme, is administered by the North Yorkshire County Council. All aspects of the Fund's management and administration, including investment matters, are overseen by the County Council's Pension Fund Committee. The North Yorkshire County Council operates the Fund for its own employees (excluding those for whom separate statutory arrangements exist), together with employees of other local authorities within the County area, and certain other bodies within the geographical areas of North Yorkshire and the City of York. In addition to employees working in local government, a number of other public, education, and voluntary sector

employees, and certain private contractors engaged in local-authority work, can participate in the fund. Total assets under management exceed £800 million, a substantial portion of which are invested in international equities. The North Yorkshire Pension Fund accordingly has a significant interest in the integrity and honesty of global securities markets, and in the ability of investors to recover when an issuer of securities violates U.S. securities laws.

Amici have an interest in being able to rely on the fact that an international issuer of securities has volunteered to make itself subject to American securities laws by listing its securities on an American stock exchange and filing periodic reports with the U.S. Securities and Exchange Commission ("SEC"). An issuer that has chosen to subject itself to U.S.-law periodic reporting requirements accepts both the duty of complying with those laws, and the legal consequences for filing fraudulent reports—particularly where the false information in those reports is generated by fraud at an American subsidiary. One of those consequences is legal liability not just to American investors, but to all investors injured by the fraud.

ARGUMENT

All acknowledge that HomeSide Lending, a wholly owned U.S. subsidiary of National Australia Bank ("NAB"), was America's sixth-largest mortgage-servicing company when it generated false financial statements for inclusion in NAB's financial statements and regulatory filings, including those filed with the SEC. No one disputes that American and Australian markets for NAB's securities moved in tandem in response to the fraudulent information that was included in those reports. Yet the Second

Circuit has held that even if NAB and its Florida-based subsidiary's American officers acted with fraudulent intent, insufficient conduct took place in the United States for American courts to exercise subject-matter jurisdiction *when foreign investors seek relief* for clear violation of the U.S. securities laws antifraud provisions. This holding makes little sense.

It is clear from the Petitioners' allegations—which must, at this stage of the litigation, be accepted as true[2]—that fraud was conceived and executed from NAB's Florida subsidiary. Congress could not, in framing the Securities Exchange Act,[3] have intended for the "United States to be used as a base for manufacturing fraudulent devices for export, even when these are peddled only to foreigners."[4] This Court should accordingly reject any contention "that Congress intended to allow the United States to become a 'Barbary Coast,' as it were harboring international securities 'pirates.'"[5]

The case for exercising federal subject-matter jurisdiction over foreign investors' claims in this case is made particularly compelling by the fact that NAB, with its extensive U.S. operations, *chose* to list its securities for trading on the New York Stock Exchange—in the form of American Depository Receipts ("ADRs"). By so doing, NAB voluntarily subjected itself to U.S. securities laws requiring it to file periodic financial reports with the SEC, in

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[2] *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[3] 15 U.S.C. §78a *et seq.*

[4] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975).

[5] *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

compliance with the Securities Exchange Act of 1934 and regulations promulgated thereunder. NAB thus voluntarily chose to subject itself to the consequences of violating those laws and regulations—including potential liability for violation of §10(b) and Rule 10b-5.

To deny relief to foreign investors merely because they purchased NAB securities outside the United States would be to ignore the transnational character of modern securities markets, flouting congressional intent and offending basic principles of fairness and comity.

With the Exchange Act, Congress crafted registration and reporting requirements for publicly traded securities so that reliable information would be available to all investors, *both foreign and domestic*. In §2 of the Exchange Act, Congress observed that modern securities markets are international in scope, with countless transactions establishing market prices potentially subject to manipulative practices that know no national boundaries. The statute itself declares in §2(2) that "[t]he prices established and offered in such transactions are generally disseminated and quoted *throughout the United States and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold."[6] "Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," Congress noted in §2(3).[7] Since securities prices tend to rest on publicly available information, Congress provided for the scheme of regulated periodic disclosures

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[6] 15 U.S.C. §78b(2) (emphasis added).

[7] 15 U.S.C. §78b(3).

embodied in the Exchange Act, to which companies that choose to issue securities for trading in the United States are properly subject.[8] Congress clearly intended for investors—both foreign and domestic—to be able to rely on the integrity of resulting market prices.

From the record in this case it appears that Congress' fundamental assumptions concerning securities markets were well-grounded. NAB is a truly international operation, whose 1.5 billion shares of common stock traded "on the Australian Securities Exchange, the London Stock Exchange, the Tokyo Stock Exchange, and the New Zealand Stock Exchange," while the company listed its ADRs to trade on the New York Stock Exchange, thereby bringing itself under the Exchange Act's periodic reporting requirements and liability provisions.[9] NAB's Florida-based HomeSide Lending subsidiary, where the conduct amounting to fraud allegedly took place, was America's sixth-largest mortgage-servicing company. And it is clear from the record that the American and foreign markets moved together in response to financial information relating to NAB's American subsidiary.[10]

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[8] *See generally* Adolph A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 393-394, & nn.3-6, 395-97, 399-400 (1938); *see also* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931).

[9] *See* Petitioner's Appendix ("Pet. App.") at 2a [*Morrison v. National Australia Bank, Ltd.*, 547 F.3d 167, 168 (2d Cir. 2008)].

[10] The Second Circuit's opinion itself recites:

> In 2001, NAB revealed that the interest assumptions in the valuation model used by HomeSide to calculate the MSR were incorrect and resulted in an overstatement in the value of its servicing rights. In July 2001,

The lower courts typically have analyzed whether subject-matter jurisdiction exists for foreign victims of a transnational fraud to seek relief under the Exchange Act's antifraud provisions by asking "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."[11] Petitioners have urged this Court instead to adopt the formulation proposed by the SEC, that the federal securities laws should apply if "'conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.'"[12]

Either way, this is a case that properly implicates §10(b)'s proscription of "any manipulative or deceptive device or contrivance" affecting securities transactions,[13] since the primary fraudsters *operated out of Florida*, generating phony financial statements

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> NAB disclosed that it would incur a $450 million write-down due to a recalculation in the value of HomeSide's MSR. *NAB's ordinary shares and its ADRs both fell* more than 5% on the news. In September 2001, NAB announced a second write-down of $1.75 billion of the value of HomeSide's MSR, *causing NAB's ordinary shares to plummet by 13% and its ADRs to drop by more than 11.5% on the NYSE.*

Pet. App. at 3a-4a [*Morrison*, 547 F.3d at 169].

[11] Pet. App. at 8a [*Morrison*, 547 F.3d at 171]. As the Second Circuit observed in this case, "the two parts of the test are applied together because 'an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.'" *Id.* (quoting *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)).

[12] Brief for Petitioners at 19 (quoting Pet. App. at 48a).

[13] 15 U.S.C. §78j(b).

there *for inclusion in NAB's reports filed with the SEC*. Thus, the critical wrongful conduct took place in the United States, producing false information that was in fact included in NAB's financial reports filed with the SEC. The fraud, moreover, indisputably affected NAB's securities prices, both on the U.S. market and abroad.[14]

Though the Florida fraudsters' false accounting for NAB's American subsidiary clearly affected the price of NAB securities both abroad and in the United States, the plaintiffs apparently placed little emphasis below on the price effects of the fraud in the American securities market.[15] Perhaps they eschewed arguing these domestic effects because the NAB ADRs that traded in the United States came to relatively little of the issuer's total worth. Respondents have, for example, told this Court that "ADRs held by Americans represented only a tiny fraction of NAB's equity capitalization," with U.S. residents'

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[14] *See supra* note 10.

[15] Again, from the Second Circuit's opinion:

> Another significant factor at play here is the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets. Appellants press their appeal solely on behalf of foreign plaintiffs who purchased on foreign exchanges and do not pursue the "effects" test. They do not contend that what Appellants allegedly did had any meaningful effect on America's investors or its capital markets. The factor weighs against our exercise of subject matter jurisdiction.

Pet. App. at 20a-21a [*Morrison*, 547 F.3d at 176].

ADR holdings valued at "only 1.1 percent of the company's ordinary shares."[16]

But why would NAB list on an American stock exchange if it was not going to raise capital in the United States? The answer should be obvious. By voluntarily listing its securities on an American exchange and filing reports with the SEC, a foreign issuer signals to global investors its willingness to comply with—and be bound by—the U.S. law's disclosure and liability provisions. That willingness translates into greater liquidity and higher prices for its shares, whether they be the U.S.-listed ADRs or common stock traded on non-U.S. exchanges.

The University of Denver's Professor J. Robert Brown, Jr., writes that "[t]he United States is often viewed as a gold standard for purposes of accurate and complete disclosure, and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence."[17] "Many foreign companies have elected to list on U.S. exchanges in part because of the positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for

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[16] Brief for Respondents in Opposition to Petition at 2 (citing Court of Appeals App. 280; Pet. App. at 33a).

[17] J. Robert Brown, Jr., *Criticizing The Critics: Sarbanes-Oxley And Quack Corporate Governance*, 90 Marq. L. Rev. 309, 327 (2006).

minority investors," agrees Tulane University Professor Onnig H. Dombalagian.[18]

The cachet of American listing—and the message it communicates of compliance with U.S. securities regulation—may be important for companies in the developing world.[19] Yet evidence suggests "that stocks from developed markets benefit more from cross-listings in the United States than do stocks from emerging markets," with one study finding "an average 30 percent increase in the home market value of trading after listing on the NYSE."[20] After

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[18] Onnig H. Dombalagian, *Demythologizing The Stock Exchange: Reconciling Self-Regulation And The National Market System*, 39 U. Rich. L. Rev. 1069, 1129 (2005).

[19] "Historically, companies from less-developed or less-regulated countries would also purposely list in the United States to subject themselves to the stringent U.S. regulatory standards, thereby providing investors with confidence. Being listed on a U.S. exchange gave these companies credibility so they could attract investors who ordinarily might not have purchased their shares in a foreign marketplace." Cory L. Braddock, *Penny Wise, Pound Foolish: Why Investors Would Be Foolish To Pay A Penny Or A Pound For The Protections Provided By Sarbanes-Oxley*, 2006 B.Y.U. L. Rev. 175, 200 (2006).

[20] Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe*, 3 Va. L. & Bus. Rev. 207, 230 (2008) (citing Katherine Smith & George Sofianos, *The Impact of an NYSE Listing on the Global Trading of Non-U.S. Stocks*, 2-3 (New York Stock Exchange, Working Paper No. 97-02, 1997) (study covering 128 non-U.S. stocks listed on the NYSE between 1985 and 1996) (available online at http://www.nyse.com/pdfs/wp97-02.pdf (last visited January 23, 2010))). Another study found that for companies trading on the Toronto Stock Exchange, cross-listing securities in the United States has positive effects on their home exchange. *See* Jackson & Pan, *Regulatory Competition*, 3 Va. L. & Bus. Rev. at 228.

conducting a detailed study of European issuers, the Harvard Law School's Professor Howell E. Jackson and Cardozo Law School's Professor Eric J. Pan together concluded that European companies list in the United States not just to access "additional demand from U.S. investors," but also to enjoy "the prestige associated with entering the U.S. market" for what it says to global investors.[21]

Investors worldwide rely on the fact that a company chooses to subject itself to U.S. securities regulation by listing on an American exchange and complying with the Exchange Act. The empirical evidence shows that a foreign company's stock generally rises on news that it is listing in the United States and will be subject to U.S. securities laws.[22] The current A.A. Berle Professor of Law at Columbia University, John C. Coffee, Jr., explains:

> Of the thirteen thousand companies now registered with the SEC as "reporting" companies, it

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[21] Jackson & Pan, *Regulatory Competition in International Securities Markets: Evidence From Europe*, 3 Va. L. & Bus. Rev. at 224.

[22] Risk and return are related, so that relatively risky securities must pay a higher return than less risky securities (compare, for example, high-return junk bonds with the lower return of investment-grade bonds). Thus if listing on an American exchange and committing to periodic filings with the SEC is perceived to signal reduced risk of losses from misinformation and fraud, one would expect a security's price to rise on news of listing on an American exchange, followed by lower investment returns thereafter—reflecting investors' perceptions of reduced risk. The empirical evidence bears this out. *See* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidenced from Foreign Stocks Listing in the United States*, 54 J. Fin. 981, 982 (1999).

is estimated that more than one thousand are foreign.

> The accelerating pace of this migration may seem surprising when one realizes that foreign issuers incur extensive regulatory costs when they enter the U.S. markets *and that most have never thereafter made securities offerings in the United States*. Why then do they list? Arguably, companies in smaller markets gain liquidity and possibly also some international recognition and prestige from a U.S. listing. But greater motivation probably lies in the finding, repeatedly observed by financial economists, that *the announcement of a dual listing on a U.S. exchange by a foreign firm typically increases the firm's share value.*[23]

As a matter of fact, one study found the greatest market-price effect was for Australian companies that listed in the United States.[24]

In this case, NAB *chose to list* its securities as "Level III ADRs, the most prestigious and costly type of listing, requir[ing] full SEC disclosure with Form 20-F and compliance with the exchange's own

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[23] John C. Coffee, Jr., *The Future As History: The Prospects For Global Convergence In Corporate Governance And Its Implications*, 93 N.W.U.L. Rev. 641, 673-74 (1999) (emphasis added).

[24] Foerster & Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. Fin. at 994 (noting "the largest average weekly rise for the Australian firms" in a 153-firm sample of Canadian, European, and Asia-Pacific region companies choosing to cross-list in the United States between 1976 and 1992).

listing rules."[25] Respondents themselves confirm that "[b]ecause of the ADRs, NAB filed its Australian disclosures with the SEC on forms 6-K and 20-F."[26] Thus, by listing securities on the New York Stock Exchange, and by filing periodic reports with the SEC, NAB signaled to investors its willingness to comply with—and be bound by—U.S. securities laws. That NAB did so in order to signal to global investors that it intended to subject itself to U.S. law is confirmed by the fact that NAB has not raised significant capital by issuing securities in the United States, despite its massive U.S. operations through its HomeSide Lending subsidiary, which the Second Circuit recognized was "America's sixth biggest mortgage service company."[27]

Having listed its securities in an American stock exchange, and volunteered to comply with U.S. securities laws, NAB should not be permitted to evade the full force of those laws. Respondents counter that petitioners "'do not allege that they were even aware of the SEC filings, much less relied upon them.'"[28] That individual plaintiffs did not *actually see* NAB's false SEC filings should be entirely beside the point. Even when reliance is an element of a federal securities claim, it may be satisfied by reliance on the integrity of securities' market price. When Congress with the Exchange Act inserted a

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[25] Foerster & Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. Fin. at 984.

[26] Brief for Respondents in Opposition to Petition at 2.

[27] Pet. App. at 3a [*Morrison*, 547 F.3d at 169].

[28] Brief for Respondents in Opposition to Petition at 2 (citations omitted).

reliance requirement for certain claimants under §11 of the Securities Act of 1933, for example, it specified that "such reliance may be established without proof of the reading of the registration statement."[29] This Court held in *Basic Inc. v. Levinson*, 485 U.S. 224, 241-47 (1988), that the same holds for §10(b) claims.

When it enacted the nation's federal securities laws, Congress knew how securities markets operate from articles and books published by Columbia law professor Adolph Augustus Berle Jr.—a member of Franklin Roosevelt's "brain trust" and one of the most influential legal academics of his time. "With the increasing public demand for liquidity of value—which in practice means the maintenance of an active trading market in securities—there has arisen another method by which corporate managements can control the stockholder's position," Professor Berle observed in his 1928 book *Studies in The Law of Corporation Finance*.[30] "This is control of the market price of securities through manipulation of information concerning the corporate affairs."[31] Such manipulation of market prices, Professor Berle observed, is of "immediate importance to that increasing body of stockholders who gauge their position by daily market reports and take action accordingly."[32]

In a 1931 article on *Liability for Stock Market Manipulation*, Professor Berle wrote that "*all markets* move in a nexus of information gathered from

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[29] 15 U.S.C. §77k(a); *see infra* at 18-20.

[30] ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATION FINANCE 176 (Chicago: Callaghan & Co., 1928).

[31] *Id.*

[32] *Id.*

all sources and circulated in a variety of ways, recognized and unrecognized."[33] He elaborated:

> Most exchanges require the corporation or its sponsors to give information respecting the corporation whose stock is placed on the market, as a condition precedent to the admission of that security trading. The older and better established exchanges require such information in great detail. Where, in such statement, false information is included, any purchaser in the market would seem to have an action in deceit or fraud for damage suffered therefrom.[34]

Professor Berle's 1931 article laid out the basics of what this Court would eventually embrace as the "fraud on the market" theory of reliance:

> Is it necessary that the purchaser knows of the specific false statement? Probably not; the only decision on the point indicates that where the effect of the statement was to create a false valuation or appraisal by the entire market, and the buyer relied upon the state of the market, he had, at second hand as it were, relied on the statement itself. The chain of causation between the statement relied upon and the price adopted by the investor is slightly longer than in the ordinary case of deceit, but is no less direct. If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market

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[33] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268 (emphasis added).

[34] *Id.* at 268-69 (footnotes omitted).

> price, he has relied on the market situation, which in turn resulted from the false statement.
>
> In like manner, if an outsider circulates a false report as to the earnings of a particular corporation which affects the price of its stock thereby subserving his own concealed interest, relief may be had against him by any person buying or selling in the market, where it appears that the report was designed to affect the market. It may be asked if this is a variation of the common law rule that the statement must be intended to be relied upon. Obviously not; for while the maker of the false representation has not singled out a specific individual for his victim, he has tossed his squib into a crowd, one or many of whom may be hit; and this fact is, or at least should be, known to him.[35]

In their 1932 landmark *The Modern Corporation and Private Property*, Professors Adolph A. Berle, Jr., and Gardiner C. Means restated the basics of fraud-on-the-market reliance in market-manipulation cases.[36] Thus, "if a corporation consciously over-

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[35] *Id.* at 269-70 (footnotes omitted). "Writing in 1931, Adolf Berle, probably the era's most influential commentator on corporate finance, asserted that courts had already gone much further than commonly assumed to protect the stock market from fraud." Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 407 n.96 (1990).

[36] *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 314 & n.1, 322 (New York: The MacMillan Co., 1932). Berle and Means generally are deemed "[t]he most influential corporate commentators in the first half of the twentieth century." Eric A. Chiappinelli, *The Moral Basis of State Corporate Law Disclosure*, 49 Cath. U.L. Rev. 697, 709 (2000). Theirs was "the most influential

stated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made.[37]

Though some later lower-court decisions tie the concept of investor reliance in such cases to recent notions of informational "efficiency," the central premises of market reliance—that securities prices may be manipulated by fraud, and that those who

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book on corporation law and 'the Bible' of the Roosevelt administration." David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 Geo. L.J. 61,100 (2003). Widely read and highly influential when published in 1932, their book "remains as one of the most cited works in recent decades." Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 Law & Soc. Inquiry 179, 180 (2005). *See also* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 Yale L.J. 1519, 1519 (2004) ("still by far the most influential book ever written on American corporate law, was Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (1932)"); Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1220 n.122 (1999) ("Berle and Means's *The Modern Corporation and Private Property* may be the most influential book written in corporate law scholarship."); Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 Hastings L.J. 1327, 1329 (1979) ("the single most influential book ever written about corporations"); Robert Hessen, *The Modern Corporation and Private Property: A Reappraisal* 26 J.L. & Econ. 273, 273-74, 278-81 (1983) (observing that Berle and Means influenced New Deal securities legislation); George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J.L. & Econ. 237, 258 (1983) ("Means can properly be counted among the most influential economists of our century.").

[37] BERLE & MEANS, THE MODERN CORPORATION, *supra*, at 322.

rely on the market's integrity may suffer—significantly predate the idea that securities markets are allocatively or informationally "efficient."[38] The fact that market prices incorporate information does not depend upon the Efficient Capital Market Hypothesis, with its supposition that *some* market prices do so almost instantaneously.[39]

Congress took note of these principles. Securities Act §11's liability rules, for example, are based on Congress' understanding that information in offering documents tends to determine the price at which new securities sell, even if they do not yet trade in a strictly "efficient" market. The 1933 Act's House Report explained that representations in a registration statement, "although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those manifold causes that are the impelling

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[38] *See* Adolf A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); Adolf A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 393-94 & nn.3-6, 395-97, 399-400 (1938); *Rex v. De Berenger*, 3 Maule & Selwyn Rep. 67, 105 Eng. Rep. 536 (King's Bench 1814) (noting effect on British securities markets of false rumors that Napoleon Bonaparte had died and that peace with France was imminent); *United States v. Brown*, 5 F. Supp. 81, 84-95 (S.D.N.Y. 1933) (reviewing common law precedents pre-dating the Efficient Capital Market Hypothesis), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

[39] *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945) (explaining how prices, in general, impound information); Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268-70 (explaining how stock market prices impound information, decades before the Efficient Capital Market Hypothesis was framed).

motive of the particular purchase."[40] "Inasmuch as the value of a security may be affected by the registration statement," the express civil remedies under §11 originally were "given to all purchasers regardless of whether they bought their securities in an interstate or intrastate transaction and regardless of whether they bought their securities at the time of the original offer or at some later date, provided, of course, that the remedy is prosecuted within the limitations provided by section 13."[41]

With the Exchange Act, Congress amended §11 in 1934 to require that an investor purchasing a registered security after the issuer provided audited financial statements for a year following its registered offering must prove reliance, "but such reliance may be established without proof of the reading of the registration statement."[42] The Conference Report

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[40] H.R. Rep. No. 85, 73d Cong., 1st Sess., at 10 (1933), *reprinted in* 2 J.S. ELLENBERGER & ELLEN P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18 (Littleton, Colorado: Fred B. Rothman & Co., 2001).

[41] H.R. Rep. No. 85 at 22; *see also* H.R. Rep. No. 1838, 73d Cong., 2d Sess., at 41 (1934), *reprinted in* 5 J.S. ELLENBERGER & ELLEN P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 20 (Littleton, Colorado: Fred Rothman & Co., 2001) (amending the 1933 Act).

[42] Securities Exchange Act of 1934 §206(a), 48 Stat 907, amending Securities Act §11(a), codified at 15 U.S.C. §77k(a):

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration

explained: "The basis of this provision is that in all likelihood the purchase and price of the security will be predicated on that statement rather than the information disclosed upon registration."[43] But showing an effect on price was (and is) what mattered to prove reliance, "without proof of the reading of the registration statement."[44]

The Exchange Act's legislative history reflects a general understanding, that "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," provided true information indeed is disclosed.[45]

Thus, this Court held in *Basic* that principles of market reliance apply to §10(b) claims under the Exchange Act. "In drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets," this Court observed, as set out in the House Report, which it then quoted:

> statement and not knowing of such omission, *but such reliance may be established without proof of the reading of the registration statement by such person.*

15 U.S.C. §78k(a) emphasis added).

[43] H.R. Rep. No. 1838, 73d Cong, 2d Sess., at 41 (1934) (Conference Report), *reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 20.

[44] 15 U.S.C. §77k(a).

[45] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18.

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [*sic*] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[46]

"An investor who buys or sells stock at the price set by the market," this Court concluded, "does so in reliance on the integrity of that price."[47] "Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[48]

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[46] *Basic*, 485 U.S. at 246 (quoting H.R. Rep. No. 1383, at 11 [*reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18]).

[47] *Id.* at 247.

[48] *Id.*; *see also id.* at 246 n.24 ("For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *id.* at 248 n.28 (the presumption of market reliance does not depend on "any particular theory of how quickly and completely publicly available information is reflected in market price").

In sum, Exchange Act §10(b)'s antifraud provision must be deemed to cover this case, which involves a fraud conceived and executed in Florida, generating false statements in reports filed with the SEC by a foreign issuer that chose to subject itself to the Exchange Act. Since Congress said it was concerned with manipulation of securities prices "generally disseminated and quoted throughout the United States *and foreign countries*," 15 U.S.C. §78b(2), and since this case involves transnational fraud allegedly perpetrated by a U.S. subsidiary of a company that chose to make itself subject to the Exchange Act, federal courts should exercise jurisdiction over the claims of its victims—both foreign and domestic.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed. By listing its securities on the New York Stock Exchange and filing reports with the SEC, NAB told the world that it agreed to meet U.S. disclosure requirements and to comply with—and be bound by—U.S. law. Its HomeSide Lending subsidiary is an American company, servicing billions of dollars in U.S. mortgages. When the U.S. subsidiary committed fraud, by generating false financial data for NAB to include in its financial reports and file with the SEC, it both breached U.S. securities laws and inflated the price of NAB securities around the world. A company that so violates §10(b) should be liable to its victims, wherever they may reside.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF *AMICUS CURIAE*[1]

NYSE Euronext owns and operates the largest and most diverse exchange group in the world. In the United States, NYSE Euronext operates the New York Stock Exchange ("NYSE"), the world's largest cash equities exchange; NYSE Arca, a fully electronic exchange for equities, exchange traded products and options; NYSE Amex, an equities and options exchange that also lists emerging growth companies; and the NYSE Liffe U.S. futures market. In Europe, NYSE Euronext operates Euronext, a single market comprised of the combined stock exchanges of Paris, Amsterdam, Brussels and Lisbon; the NYSE Liffe derivatives markets in London, Paris, Amsterdam, Brussels and Lisbon; and NYSE Alternext, a listing market for emerging growth companies.[2]

The United States-based NYSE Euronext stock exchanges are registered with the U.S. Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") as defined in the Securities Exchange Act of 1934 (the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket consents to the filing of *amicus curiae* briefs in this matter.

2. NYSE Euronext has over 8,000 listed issues, more than any other exchange group, and trading on NYSE Euronext's equity markets represents nearly 40% of the world's cash equities trading volume.

"Exchange Act"), 15 U.S.C. § 78c(a)(26). The Exchange Act vests SROs with the authority to enact and enforce rules governing the conduct of members and member organizations, 15 U.S.C. §§ 78f(b)(1)–(9), and further mandates that SROs "protect investors and the public interest," 15 U.S.C. § 78f(b)(5). The SEC, in turn, oversees NYSE Euronext's compliance with its regulatory and operational responsibilities, including compliance monitoring, enforcement of standards for issuers and regulation of broker-dealers.

NYSE Euronext has an interest in this case because the extraterritorial application of U.S. securities laws—and specifically the implied rights of action under 15 U.S.C. § 78j(b) ("Section 10(b)") of the Exchange Act at issue here—to claims by foreign purchasers who purchased a foreign issuer's shares on a foreign exchange ("f-cubed" plaintiffs)[3] interferes with the orderly functioning of the global securities markets. By virtue of its operation of securities exchanges both within and outside of the United States, NYSE Euronext has direct involvement with foreign and

3. Many commentators and several courts have referred to such purchasers as "f-cubed" plaintiffs—a shorthand reference to this particular category of investors seeking redress in the U.S. courts. The legal standard NYSE Euronext proposes here would exclude f-cubed plaintiffs from pursuing their claims in a U.S. court. The legal standard, however, would not preclude those who purchased securities on a U.S. exchange from pursuing their claims in a U.S. court. Thus, investors who purchased National Australia Bank ("NAB") American Depository Receipts in the U.S. would potentially have a claim under Section 10(b), while foreign NAB shareholders who purchased NAB shares on the Australian Securities Exchange would not.

domestic investors, issuers, regulators, legislatures and other exchanges. Over the past decades, NYSE Euronext has witnessed and participated in the expansion of foreign exchanges and the related development of regulatory regimes governing securities transactions on those exchanges. The regimes in the countries in which NYSE Euronext operates are designed to protect the integrity of the securities markets and provide clear guidance to market participants and investors. Although the contours of those regulatory systems differ in various ways from the U.S. system—and thus reflect national policy decisions—the regulatory systems and the bodies that enforce them are accorded recognition and deference by the SEC and U.S. Department of Justice. Extraterritorial application of the implied rights of action under Section 10(b) to f-cubed claimants fails to give proper deference to such foreign regulatory regimes and actually interferes with their operation.

Extending the implied rights of action under Section 10(b) to f-cubed claimants discourages companies from listing on NYSE's U.S. exchanges. Issuers worldwide have repeatedly expressed concern to NYSE Euronext that the risk of U.S. litigation has deterred them from raising capital in the U.S. If Petitioners' arguments were to prevail, for example, a foreign issuer that conducts limited business in the U.S. and lists only 5% of its shares on a U.S. exchange would nonetheless be exposed to potential Section 10(b) liability to 100% of its shareholders. While vigorous enforcement of the antifraud provisions of the Exchange Act is critical to the proper functioning of the U.S. securities markets, foreign market participants should be governed by the

laws and regulations of their respective countries and should not be subject to the inconsistent and unpredictable application of Section 10(b) liability under U.S. law. The parameters of Section 10(b) liability should be clear and predictable, give deference to foreign sovereigns, provide certainty to litigants and avoid deterring investment in the U.S. capital markets.

For the reasons set forth herein, NYSE Euronext respectfully urges the Court to affirm the decision of the Second Circuit below.

SUMMARY OF ARGUMENT

Congress has never stated that the Exchange Act should be applied extraterritorially to claims asserted by foreign investors who purchased a foreign issuer's shares on a foreign exchange.[4] For over two centuries, this Court has repeatedly held that where, as here, an express Congressional directive is lacking, U.S. laws should be interpreted narrowly so as not to interfere with the laws of foreign nations. An expansionistic view of Section 10(b) liability amounts to nothing less than U.S. "legal imperialism." Moreover, the extraterritorial application of U.S. class action principles fosters

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4. NYSE Euronext agrees with both Petitioners and Respondents that the discussion of the extraterritorial reach of Section 10(b) liability to f-cubed plaintiffs has been inaccurately treated as a question of subject matter jurisdiction by the lower courts. *See* Pet. Br. 15-32; Resp. Br. 22. It is likely that much of the confusion below stems from attempting to interpret what may be termed "drive by jurisdictional rulings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), rather than addressing the merits of such plaintiffs' claims.

unpredictability, because it is highly uncertain that a U.S. class action judgment or settlement would be enforceable under foreign law, and because U.S. courts are ill-equipped to predict how foreign courts will view such judgments.

Although the Second Circuit reached the correct result below, the "conduct and effects" tests it applied to reach that result is unsupported by the language of the Exchange Act and relevant legislative history. Indeed, when first articulating the "conduct and effects" tests in the seminal decision *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975), Judge Friendly stated: "We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond."

This Court should apply a bright-line exchange-based test and extend the implied rights of action under Section 10(b) only to investors (whether foreign or domestic) who purchase securities on a U.S. exchange. The claims of foreign investors who purchase a foreign issuer's shares on a foreign exchange should be resolved in the country where those securities were purchased and where the harm was suffered. Such a rule avoids interference and conflicts with foreign law and regulatory regimes and provides the greatest predictability to market participants who could choose whether, and to what extent, they are exposed to litigation in U.S. courts under the Exchange Act.

A bright-line test also fosters capital-raising activities. If it is clear that f-cubed claimants cannot seek

redress under Section 10(b), a French issuer considering raising capital in a public offering in the U.S., for example, would be able to reasonably predict the scope of potential liability in the U.S. as a result of its listing. Such liability would be limited to the universe of investors who chose to purchase the issuer's securities on the U.S. exchange. With that information, the issuer could proceed with raising capital on the U.S. exchange, adjusting the size of its issuance in proportion to its choice of risk.

By comparison, if Section 10(b) liability extends to f-cubed claimants, the same French company could face expansive liability, including exposure to litigation of its entire equity offering, as a result of even a small offering on a U.S. exchange. Faced with the unquantifiable risk of potential liability to French investors who purchased the French company's securities in Paris—or, in fact, to *any* investor who purchased that issuer's securities anywhere else in the world—the company might decide not to raise capital in the U.S. markets.

For the reasons discussed more fully in this brief, NYSE Euronext respectfully urges the Court to affirm the decision below.

ARGUMENT

I. SECTION 10(b) IMPLIED RIGHTS OF ACTION DO NOT EXTEND TO FOREIGN INVESTORS WHO SUFFERED FOREIGN HARMS

For over two hundred years, this Court has repeatedly affirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)); *see generally Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). The presumption against extraterritorial application of U.S. laws can only be overcome by a demonstration of "the affirmative intention of the Congress clearly expressed." *Aramco*, 499 U.S. at 248 (citation and internal quotations omitted). Accordingly, if there is any question whether Congress intended a law to apply extraterritorially, it must be resolved in a manner that limits its application to domestic concerns. *Id.* Applying these settled principles, the Court should affirm the dismissal of Petitioners' claim.

Courts have consistently held that "the Securities Exchange Act is silent as to its extraterritorial application." *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313 (11th Cir. 2009) (quoting *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995)); *see also*

Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 29-30 (D.C. Cir. 1987) (explaining that the securities laws "furnish no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions"). Likewise, the limited legislative history confirms that Congress "chose to protect only those investors whose trades occur inside the United States." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 681 (1990).

Moreover, because the private right of action is a judicially-created remedy, it follows that no affirmative intention of Congress can be found, let alone a clearly expressed intention, to apply Section 10(b) extraterritorially. *Cf. Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.").

In their Petition for Writ of Certiorari, Petitioners candidly acknowledged that "the Exchange Act and its legislative history are silent on the issue of extraterritorial application." Cert. Pet. 16. As Respondents set forth in their brief, Petitioners' latest attempt to overcome this dearth of legislative intent by pointing to language contained in Section 10's preamble prohibiting manipulative and deceptive devices in "interstate commerce" fails. Resp. Br. 26-31.

First, as this Court squarely held in *Aramco*, such "boilerplate" language does not satisfy the requirement that there be a "clear" expression of Congressional intent. *Aramco*, 499 U.S. at 250-51 ("[W]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad."). Further, as this Court has noted on several occasions, when Congress wished to create liability under the securities laws, "it had little trouble doing so." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (citation and internal quotations omitted).

Second, even if the generic reference to "interstate commerce" in the preamble to the Exchange Act created an ambiguity regarding the extraterritorial application of the Exchange Act (which it does not), *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), preclude Petitioner's arguments. These decisions declined to extend the extraterritorial reach of statutes that—unlike the implied rights under Section 10(b) of the Exchange Act at issue here—actually provided for some extraterritorial effect.[5]

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5. The additional arguments that Petitioners and their *amici* make—contending that Congressional intent to apply Section 10(b) extraterritorially can be found in other sections of the Exchange Act—are discussed extensively by Respondent. Resp. Br. 29-31, 42-44. That discussion demonstrates that there is simply no basis for Petitioners' alternative theories for establishing affirmative Congressional intent.

In *Empagran*, the Court interpreted the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, which explicitly provides for some extraterritorial application by bringing within its reach certain foreign conduct that affects American commerce, and the FTAIA's application to claims asserted by plaintiffs who purchased vitamins *outside* the U.S. and suffered injury *outside* the U.S.—like the f-cubed plaintiffs here. *Empagran*, 542 U.S. at 162. Concluding that extraterritorial application to such claims was not reasonable, the Court reiterated its allegiance to international comity considerations, observing that if the U.S.' "policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of *legal imperialism*, through legislative fiat." *Id.* at 169 (emphasis added).[6]

And, just two terms ago, in *Microsoft*, this Court carefully cabined the extraterritorial application of U.S. patent laws, restating the "presumption that United States law governs domestically but does not rule the world." *Microsoft*, 550 U.S. at 454. *Microsoft* determined that the extraterritorial reach of Section 271(f) of the Patent Act, 35 U.S.C. § 271(f), did not extend to potentially infringing conduct that took place *only* abroad. *Id.* at 454-56. Pivotal to the considerations in this case, the Court held that the presumption against extraterritoriality "is not defeated . . . just because [a statute] specifically

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6. The Court also rejected the idea that courts should take comity considerations into account on a case-by-case basis as "too complex to prove workable." *Empagran*, 542 U.S. at 168.

addresses [an] issue of extraterritorial application." *Id.* at 455-56 (quoting *Smith v. United States*, 507 U.S. 197, 204 (1993)).

In view of the clear limitations that *Empagran* and *Microsoft* imposed on the reach of statutes that *actually* provided for some extraterritorial application, the generic preamble to which Petitioners cite cannot overcome the presumption against the extraterritorial application of the implied rights under Section 10(b). Like the claims of the plaintiffs in *Empagran* and *Microsoft* who suffered only foreign injuries, Petitioners' claims should not be heard in the U.S. courts.

II. EXTRATERRITORIAL APPLICATION OF SECTION 10(b) LIABILITY INTERFERES WITH FOREIGN LAW

The mere "*risk* of interference with a foreign nation's ability independently to regulate its own commercial affairs" is reason enough to reject the extraterritorial application of U.S. laws. *See Empagran*, 542 U.S. at 165 (emphasis added). That risk of interference flows automatically from the application of U.S. securities laws to foreign purchasers who acquire foreign-issued securities on a foreign exchange.

It is critical to observe that such foreign purchasers make investment decisions based on the laws and regulations in the countries where they purchase securities. Those investment decisions are predicated upon the disclosure obligations, liability protections and availability of remedies in the particular country where the transaction takes place. Allowing f-cubed purchasers

to assert implied rights of action under Section 10(b) in the U.S. courts would substitute U.S. legal and regulatory policy judgments for those of foreign jurisdictions, causing a direct negative impact on the orderly conduct of the global securities markets. Such an imposition of U.S. law over foreign transactions is directly at odds with the years of effort that the U.S. has devoted to promoting cooperation with foreign governments in the regulation of securities trading.

A. The U.S. Already Recognizes and Defers to Foreign Securities Laws

In recognition of foreign regulatory regimes, the U.S. has entered into dozens of cooperation agreements and treaties with foreign regulators and governments to facilitate the international enforcement of securities laws. Those agreements reflect the judgment of the U.S., and particularly the SEC,[7] that foreign nations can (and do) effectively regulate their own securities markets, and that it is appropriate to cooperate with those governments in support of their systems of regulation and enforcement.[8]

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7. The development of such extensive conventions and treaties undercuts Petitioners' suggestion that any conflict in laws should be resolved by addressing the matter to the State Department. Pet. Br. 40 n.17. A balance of U.S. and foreign interests has already been struck, as reflected in these treaties and conventions.

8. *See, e.g.*, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight, SEC-Euronext, Preamble,

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The SEC has entered into bilateral enforcement cooperation memoranda (called Memoranda of Understanding, or "MOUs") with 20 individual foreign regulatory commissions, and, further, has signed the International Organization of Securities Commissions ("IOSCO") Multilateral Memorandum of Understanding, which has been counter-signed by 63 foreign regulatory authorities.[9] Likewise, the United

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Jan. 25, 2007 (expressing the SEC's and Euronext's "willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates, particularly in the areas of investor protection, fostering market integrity, and maintaining investor confidence and systematic stability"); Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Preamble, Mar. 18, 1985, 1985 U.S.T. 230 (stating that the sovereignties "desir[ed] to improve the effectiveness of both countries in the investigation, prosecution, and suppression of crime through cooperation and mutual assistance in law enforcement matters"). In fiscal year 2008, the SEC made 594 requests for information to foreign regulatory authorities and responded to 414 requests for information from foreign authorities. *See* Office of International Affairs: International Enforcement Assistance, http://www.sec.gov/about/offices/oia/oia_crossborder.htm (last visited Feb. 24, 2010).

9. The U.S. has bilateral enforcement MOUs with regulatory authorities in Argentina, Australia, Brazil, Canada, Chile, France, Germany, Hong Kong, Israel, Italy, Japan, Jersey, Mexico, The Netherlands, Norway, Portugal, Singapore, Spain, Switzerland and the United Kingdom and Joint Statements for Enforcement with Costa Rica, South Africa and Sweden. *See* Office of International Affairs: Cooperative Arrangements with Foreign Regulators, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited Feb. 24, 2010).

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States has entered into Mutual Legal Assistance Treaties ("MLATs") with no fewer than 55 countries.[10]

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Further, the U.S. is a party to the IOSCO Multilateral Memorandum of Understanding, which is countersigned by regulatory authorities in Albania, Alberta, Australia, Austria, Bahrain, Belgium, Bermuda, Brazil, British Columbia, the British Virgin Islands, Bulgaria, the Cayman Islands, China, Croatia, Cyprus, the Czech Republic, Denmark, Dubai, Finland, France, Germany, Greece, Guernsey, Hong Kong, Hungary, India, the Isle of Man, Israel, Italy, Japan, Jersey, Jordan, Kenya, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Montenegro, Morocco, The Netherlands, New Zealand, Nigeria, Norway, Ontario, Poland, Portugal, Quebec, Romania, Serbia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Republika Srpska, Switzerland, Thailand, Tunisia, Turkey and the United Kingdom. *See* IOSCO, List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Feb. 24, 2010). The IOSCO Multilateral Memorandum of Understanding is credited with facilitating "a substantial number of assistance requests . . . between national regulators[,]" including in the high-profile cases related to the Ahold, Royal Dutch/Shell, Parmalat and Vivendi Universal corporations. *See* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale J. Int'l L. 113, 145 (2009).

10. These countries include Bulgaria, Romania, Malaysia, Germany, Japan, Liechtenstein, Belize, Sweden, Ireland, India, South Africa, Cyprus, Russia, Egypt, Greece, France, the Ukraine, Estonia, the Czech Republic, St. Vincent, the Grenadines, Brazil, Lithuania, Israel, Venezuela, St. Kitts, Nevis, Latvia, Antigua, Barbuda, Dominica, Grenada, St. Lucia, Barbados, Trinidad, Tobago, Poland, Luxembourg, Hong Kong,

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Those MOUs and MLATs provide for a broad range of cooperative mechanisms designed to secure compliance with the respective laws and regulations of the U.S. and foreign countries. These mechanisms include exchanging information, producing documents and procuring witness testimony.[11] The exchange of information between the U.S. and foreign regulators and agencies under the MLATs and MOUs occurs *without regard* to whether the conduct under investigation or prosecution in the foreign country would also constitute a violation of the U.S. securities laws, and vice versa—again demonstrating the deference that the U.S. accords

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Austria, Hungary, the Philippines, the United Kingdom, South Korea, Nigeria, Spain, Uruguay, Argentina, Jamaica, the Bahamas, Belgium, Canada, Mexico, the Cayman Islands, The Netherlands and Columbia. *See* The United States Library of Congress Treaties Search Page, http://thomas.loc.gov/home/treaties/treaties.htm (search "Word/Phrase" for "mutual legal assistance") (last visited Feb. 24, 2010).

11. *See, e.g.*, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, International Organization of Securities Commissions, § 7(b), May 2002, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf; Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, SEC-Austl. Sec. & Inv. Comm'n, § 4(2), Oct. 20, 1993, http://www.sec.gov/about/offices/oia/oia_mututal_recognition/australia/supervisory_mou.pdf; Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Art. II, Mar. 18, 1985, 1985 U.S.T. 230; Treaty with the Italian Republic on Mutual Assistance in Criminal Matters, U.S.-Italy, Art. I, Nov. 9, 1982, 1982 U.S.T. 225.

to the actions of its regulatory counterparts.[12] The net consequence of those agreements is that the U.S. has made a profound commitment to support the development of local regulation and enforcement of securities laws. Operating within this framework, the SEC has deferred to investigations conducted by foreign authorities in several noteworthy "global" securities cases.[13]

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12. *See* 15 U.S.C. § 78u(a)(2); *see also, e.g.*, Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, SEC-Austl. Sec. Comm'n, § 4(1), Oct. 20, 1993, http://www.sec.gov/about/offices/oia/oia_mututal_recognition/australia/supervisory_mou.pdf; Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Art. II, Mar. 18, 1985, 1985 U.S.T. 230.

13. For example, in the *Royal Ahold* litigation, the SEC did not seek penalties in its enforcement action against Royal Ahold at the request of the Dutch public prosecutor's office "because of potential double jeopardy issues under Dutch law." *SEC Charges Royal Ahold and Three Former Top Executives with Fraud*, Accounting and Auditing Enforcement Act Release No. 2124, 83 SEC Docket 2976 (Oct. 13, 2004); *see also* Gregory Crouch, *Ahold Reaches a Settlement with the S.E.C.*, N.Y. Times, Oct. 14, 2004, at C1 (reporting that the SEC stated it was "deferring to the Dutch criminal authorities to obtain the appropriate sanctions"). Similarly, in the *Parmalat* litigation, cooperation between the SEC and the Italian authorities in investigating fraud at an Italian dairy company resulted in the SEC deferring to Italian bankruptcy proceedings. *See Parmalat Settles with S.E.C. on Accusations of Bond Sale Fraud*, N.Y. Times, July 29, 2004, at C8 (reporting that the SEC deferred to Italian bankruptcy proceedings when assessing no fines against Parmalat in settlement). Similar cooperation between the SEC and the French regulatory body occurred in the high-profile *Vivendi* litigation. *See SEC Files Settled Civil Fraud Action Against Vivendi Universal*, Accounting and Auditing Enforcement Act Release No. 1935, SEC Docket 3043 (Dec. 24, 2003).

Neither Petitioners nor the *amici* supporting their position say anything about the extensive cooperation between the U.S. and dozens of foreign nations in this precise area. Instead they suggest that foreign purchasers have no effective remedy for alleged securities law violations in their own jurisdictions. Br. for MN Servs. Vermogensbeheer V.B. et al. as *Amici Curiae* 5; Br. for Austl. Shareholders' Ass'n and the Austl. Council of Super Investors as *Amici Curiae* 6, 8. Their position is both factually incorrect and an overly parochial critique of regulatory regimes that are intentionally different in significant or subtle ways from that of the U.S.[14]

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14. As the list of countries cited above indicates, *supra* note 9, nearly all countries that have developed exchanges also have local regulation and investor protection laws. *See* Glenn Boyle & Richard Meade, *Intra-Country Regulation of Share Markets: Does One Size Fit All?*, 25 Eur. J. Law & Econ. 151, 153 (2008) ("All major stock markets are subject to regulations that, among other things, specify required information disclosure by firms, define restrictions on insider trading, and impose constraints on corporate governance choices."). In this case, it is particularly significant to recognize that Australia has a regulated exchange, investor protection laws, and a class action scheme. *See* Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621, 645-55 (2005) (describing public and private actions for securities fraud in Australia); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 424-29 (2002) (detailing Australian federal class actions).

B. Mass Action Mechanisms Exist Outside the U.S.

Extraterritorial application of the implied rights of action under Section 10(b) also interferes with the application of private mass or group action enforcement mechanisms that have been, or are in the process of being, adopted in Europe and other jurisdictions. Foreign jurisdictions are well-equipped to fairly and reasonably adjudicate claims arising from securities transactions in those jurisdictions.[15] The adoption of mass or group mechanisms is advancing in the EU, and has already taken effect in numerous countries, including Sweden (as opt-in actions), the Netherlands (as opt-out actions), the United Kingdom (as opt-in actions wherein the court may issue a Group Litigation Order binding all class members), Canada (specifically in certain provinces), Italy (as opt-in consumer actions for damages) and, most important to the case at bar, Australia.[16]

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15. *See* Mark A. Behrens et al., *Global Litigation Trends*, 17 Mich. St. J. Int'l L. 165, 167 (2008 2009) ("More recently, the number of countries with class action or other aggregative litigation procedures has mushroomed.")

16. *See* Stephen J. Choi & Linda J. Silberman, *The Continuing Evolution of Securities Class Actions*, 2009 Wis. L. Rev. 465, 487-88 (2009); Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 Transnat'l L. & Pol'y 281, 292 (2005-2006); *see also* Behrens et al., *supra* note 15, at 173-181 (summarizing recent foreign group litigation advancements); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 60 (2007) ("Some countries already recognize securities class actions, and more are in the process of developing group litigation procedures.").

Not surprisingly, mass actions in other countries are not identical to class actions in the United States. In France, legislators have indicated that they would never adopt an opt-out procedure that would allow U.S. class action judgments to deprive their citizens of their right to decide whether or not to join in an action.[17] As an opinion from the European Economic and Social Committee regarding collective-action systems in the E.U. makes clear, there is a deep distrust and rejection of U.S.-style opt-out class actions.[18] Thus, what is developing in the many countries that have adopted or are considering group action laws is decidedly *not* a move toward accepting opt-out representative actions or other elements of U.S. contingency practice, but a

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17. *See* Leslie Schulman, *France Parliament Puts Off Class Actions Legislation Debate*, Jurist, Feb. 1, 2007, http://jurist.law.pitt.edu/paperchase/2007/02/france-parliament-puts-off-class.php; Law.com, *France's Parliament Cancels Debate on Bill Allowing Class Actions*, Jan. 31, 2007, http://www.law.com/jsp/article.jsp?id=1170151356425. The reaction by the French legislature was in direct response to a ruling from a U.S. court that concluded that France would probably recognize and enforce a U.S. class action judgment. *See In re Vivendi Universal, S.A., Sec. Litig.*, 242 F.R.D. 76, 102 (S.D.N.Y. 2007). There, the Court pointed to proposed French legislation that would have provided for *opt-in* group actions as evidence that France would recognize and enforce a U.S. class judgment. *Id.* at 100-01.

18. Opinion of the European Economic and Social Committee on Defining the Collective Actions System and its Role in the Context of Community Consumer Law, 2008 O.J. (C 12/1) 1.6 (hereinafter "E.U. EESC Opinion") ("[t]he EESC has therefore rejected the features of US style 'class actions', which are incompatible with the abovementioned traditions and principles").

collision between U.S.-style class actions and group opt-in claims.[19]

The most important lesson to be drawn from the adoption of group actions outside the U.S., therefore, is not that they provide remedies identical to U.S. remedies that could provide a basis for their recognition abroad, but rather that they provide foreign purchasers with a local remedy, similar to a class action, which another sovereign has determined to be adequate. While the group actions adopted by various nations differ in many particular respects, all of them provide a mechanism for a large number of purchasers to seek recovery on claims that would not otherwise be justified by the amount of their losses. As a consequence, there is simply no reason to force the application of Section 10(b) liability and U.S. class action mechanisms on all purchasers in the world.

III. A U.S. CLASS ACTION JUDGMENT OR SETTLEMENT MAY NOT BE ENFORCEABLE UNDER FOREIGN LAW

In addition to the mischief that follows from ignoring the policy judgments other nations have made to address securities claims, there is a substantial risk that a U.S. class action judgment or settlement will not be enforced outside the U.S.[20] When an f-cubed action that

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19. *See, e.g., id.* at 7.1.2 ("Collective actions must not take the form of the 'class actions' employed in the U.S.A.")

20. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign*

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is brought in the U.S. is resolved through settlement or trial, the issuer actually buys no peace, and the plaintiff no security. The issuer faces the prospect of two lawsuits—one in the U.S. and one overseas—because a U.S. class action settlement or judgment may not bind absent foreign class members. For similar reasons, putative class members may be unable to enforce such judgments overseas, raising the fundamental question whether a U.S. class action vindicates their rights in the first place.

As this Court explained in *Stoneridge*, it is entirely appropriate to consider the "practical consequences of an expansion" of the Section 10(b) private right. *Stoneridge*, 552 U.S. at 163. The clear conflicts between the U.S. and other nations that have arisen where U.S. courts have attempted to determine whether a class action judgment would be recognized by other nations demonstrate most dramatically the "practical consequences" of expanding the Section 10(b) private right of action extraterritorially.

These are not simply theoretical concerns. As the Second Circuit first warned in *Bersch*, adjudicating f-cubed claims as part of a class exposes foreign issuers to double recoveries in countries that would not recognize or enforce a U.S. class action settlement or judgment. *Bersch*, 519 F.2d at 986 (recognizing the

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Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, 90 Cornell L. Rev. 1563, 1566 (2005) ("Many foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation . . . .").

"dubious binding effect of a defendants' judgment (or a possibly inadequate plaintiff's judgment) on absent foreign plaintiffs or the propriety of purporting to bind such plaintiffs by a settlement"); *see also, e.g.*, *Morrison v. Nat'l Austl. Bank, Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008) ("In various other countries, class actions are either not available or the ability of class actions to preclude further litigation is problematic.").[21]

A. Lower Courts Have Issued Inconsistent and Contradictory Rulings

Contradictory opinions on the enforceability of U.S. judgments further undermine predictability and demonstrate how poorly equipped U.S. courts are to interpret the law of other nations.[22] For example, in

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21. This double exposure has been widely recognized. *See* Choi & Silberman, *supra* note 16, at 480 (An opt-out class action's "'binding effect' is not known or generally accepted by many countries, supporting the argument that the judgment will not have any preclusive effect outside the United States."); Buxbaum, *supra* note 16, at 60 (Jurisdictional overlap created by f-cubed plaintiffs "presents the possibility of duplicate recovery, as a court in one country cannot enforce in other jurisdictions an order to release all future claims as a condition of settlement or judgment.")

22. These inconsistencies are perhaps not surprising, given that when determining whether a U.S. class action judgment would be enforceable in a foreign country, courts rely on the predictive opinions of experts proffered by each party as to whether the country would in fact recognize the U.S. class judgment. Moreover, lower courts have not been consistent in their articulation of the test used to determine whether foreign

(Cont'd)

Vivendi and *Alstom*, two decisions from the Southern District of New York that were decided only fifteen months apart, the court came to opposite conclusions regarding the preclusive effect of a U.S. class action judgment in the *same* country. In *Vivendi*, the court certified a class that included French, English and Dutch shareholders after concluding that courts in their respective countries would "more likely than not" recognize and grant preclusive effect to a U.S. class action judgment. *Vivendi*, 242 F.R.D. at 105. Conversely, in *In re Alstom SA Securities Litigation*, 253 F.R.D. 266, 282 (S.D.N.Y. 2008), the court determined that the plaintiffs failed to sufficiently demonstrate that the French courts would "more likely than not" recognize a class judgment rendered by a U.S. court or, furthermore, that Dutch and English courts would "more likely than not" recognize a judgment against one of the defendants.[23]

(Cont'd)

claimants should be included in a class. For example, in the seminal case of *Bersch*, the court articulated the issue as whether it was a "near certainty" that a foreign court will not recognize an American judgment. *Bersch*, 519 F.2d at 996. Later, in *Vivendi*, the same court rejected *Bersch*'s articulation of the standard and asked whether it was "more likely than not" that a foreign court would recognize a U.S. class judgment including foreign investors. *Vivendi*, 242 F.R.D. at 95.

23. The *Alstom* court concluded that English and Dutch courts would dismiss claims against defendant Alstom in deference to litigation in the French courts under a provision in Alstom's articles of association. *Alstom*, 253 F.R.D. at 288-89. As the court previously determined, the French courts would probably not recognize a U.S. class judgment. *Id.* However, the court determined that English and Dutch courts would more likely than not recognize judgments against the other defendants. *Id.*

The likelihood that a U.S. class judgment will not be given effect outside the U.S. is quite real and rests principally on the rejection, by many nations, of the binding effect of representative actions.[24] Those nations reserve to individual citizens the constitutional right to join or not join in an action affecting their rights. Not surprisingly, those nations take offense at the notion that "representative" shareholders—not authorized or selected by their co-shareholders—could preclude their countrymen from bringing their own claims in their own courts.[25] At best, those nations would accord recognition only to *opt-in* judgments or settlements, where their citizens affirmatively joined in a foreign proceeding, and

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24. E.U. EESC Opinion, *supra* note 18, at 7.2.2.3.1 (opt-out mechanisms may be regarded as "at variance with the constitutional principles of a number of states and with the European Convention on Human Rights and, in particular, with the principle of the freedom to take legal proceedings").

25. *See* Buschkin, *supra* note 20, at 1579-81; *see also* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 Tul. J. Int'l. & Comp. L. 5, 14, 34-36 (2002) (noting that an Italian court might find a U.S.-style class action "fundamentally unfair to the absent members of the class because, even though they knew nothing of the lawsuit, they are fully bound by the res judicata effect of the judgment"); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 Temp. Int'l & Comp. L. J. 217, 233-34 (1992) ("In the 'worst case' scenario, the American class action permits an absentee to be fully bound by the res judicata effect of an adverse judgment even though the absentee knew nothing of the lawsuit").

not to U.S.-style *opt-out* judgments or settlements.[26] That conflict of principles is only a part of the global distaste for what many nations perceive as U.S. arrogance, and of the global distrust of the other hallmarks of U.S.-style class action litigation, including the contingency fee arrangements that bestow windfalls on plaintiffs' attorneys.[27]

As mentioned above in the context of the *Vivendi* case, some countries have enacted laws specifically

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26. *See* Buxbaum, *supra* note 16, at 32-33 (opt-out features of U.S. class action make it "possible that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment"); *see also* Dreyfuss, *supra* note 25, at 34-36 (questioning whether Italy would recognize an "opt-out" representative action).

27. *See* E.U. EESC Opinion, *supra* note 18 at 1.6 ("the EESC has therefore rejected the features of US-style 'class actions', which are incompatible with the [EU] traditions and principles"); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179, 180 (2009) (noting that even as European countries adopt group action regimes, these regimes resist "the dreaded world of American entrepreneurial lawyering"); Behrens et al., *supra* note 15, at 165 (recognizing that foreign regimes "generally seek to permit mass resolution of claims while trying to avoid U.S.-style entrepreneurial litigation"); Buxbaum, *supra* note 16, at 63 ("U.S. entrepreneurial-style lawyering is viewed with hostility in many other countries. . . . When coupled with class actions—whose opt-out mechanism is seen as contrary to public policy in most countries—it triggers particularly adverse reactions."); Grace, *supra* note 16, at 285, 287-88, 289 (noting concerns, including that "certain mechanisms of the U.S. model encourage 'legal blackmail' and conflicts of interests for attorneys litigating such claims").

designed to preclude the enforcement of class judgments in non-E.U. states. *See supra* note 17 and accompanying text. For example, Germany has enacted the "KapMuG" (the Capital Investor's Model Proceeding Act), which "expressly rejects upholding judgments against German issuers issued by non-EU member state jurisdictions." Grace, *supra* note 16, at 299. This legislation seems to have been designed as "an effort to expressly limit U.S. class action litigation against German issuers." *Id.* There can be little argument that the extension of Section 10(b) and related class judgments extraterritorially squarely contradicts with the "desire to avoid conflicts with the laws of other nations" that this Court reaffirmed in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993). Nor can it be seriously questioned that a clash between foreign and U.S. principles of representative actions constitutes "an interference with the authority of another sovereign . . . which the other state concerned justly might resent." *N.Y. Cent. R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925).

B. The *Forum Non Conveniens* Doctrine Does Not Provide an Adequate Solution

Petitioners' only solution to the problems associated with litigating f-cubed claims in the U.S. is a general suggestion that courts use the discretionary doctrine of *forum non conveniens* as a "gatekeeper" for addressing the structural and practical problems that their interpretation of the reach of Section 10(b) liability creates. Pet. Br. 41-42. Their suggestion, however, provides no genuine relief, and treats the problem as if it were merely a question of convenience rather than differences of constitutional dimensions and interference with sovereign regimes.

In a *forum non conveniens* analysis, courts look to the adequacy and availability of an alternative forum, the location of evidence and witnesses, the availability of compulsory process and various public and private interest factors to determine whether to transfer an action for the convenience of the parties and witnesses. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (listing factors in *forum non conveniens* analysis). Utilizing the *forum non conveniens* doctrine as a gatekeeper not only fails to apply the presumption clearly set forth in *Empagran* and *Microsoft*, it also leads to precisely the type of unpredictability that should be avoided.

Thus, in *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 953 (1st Cir. 1991), the court acknowledged comity concerns when upholding the District Court's dismissal of a securities law action on *forum non conveniens* grounds, determining that the matter was better adjudicated in Canada, where the issuer was located and where the issuer's stock was traded. While the *Howe* court's conclusion was correct, that reasoning has not been consistently applied. This inconsistency is demonstrated in several decisions involving the Lernout & Hauspie litigation. In *Warlop v. Lernout*, 473 F. Supp. 2d 260, 264 (D. Mass. 2007), cited by Petitioners, the court dismissed a securities class action on *forum non conveniens* grounds after determining that Belgium's lack of a class action mechanism or fraud on the market theory did *not* render Belgium an inadequate alternative forum. However, in an earlier decision, the same court declined to dismiss claims brought on behalf of a class of different investors on *forum non conveniens* grounds because it determined that Belgium would *not* be an

adequate alternative forum. *In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74, 92 (D. Mass. 2002) ("When combined with the lack of a fraud-on-the-market theory, . . . [Belgium's] lack of a class action mechanism creates *virtually insurmountable* concerns regarding the adequacy of the foreign forum.") (emphasis added).

These cases demonstrate that the solution is not to add another layer of inconsistent rulings. Rather, the correct solution is simply to exclude such claims from the reach of Section 10(b) liability in the first place.

IV. EXTRATERRITORIAL APPLICATION OF SECTION 10(b) IMPLIED RIGHTS HARMS THE COMPETITIVENESS OF THE GLOBAL SECURITIES MARKETS

The extraterritorial application of the implied rights under Section 10(b) to claims of f-cubed purchasers harms the competitiveness of the global securities markets. For years, commentators have observed that foreign issuers have elected not to list their securities on U.S. exchanges precisely to avoid exposure to the U.S. legal system.[28] The extraterritorial application of Section 10(b) liability converts that general fear of litigation into a real risk. As this Court recognized in *Stoneridge*, in the context of addressing the contours of so called "scheme liability" under Rule 10b-5(a)-(c):

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28. *See* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the U.S.' Global Financial Services Leadership*, ii, 5, 12, 43-54 (2006), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

> Overseas firms with no other exposure to our securities laws could be deterred from doing business here, . . . [which] in turn, may raise the costs of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.

Stoneridge, 225 U.S. at 164. That is exactly what is happening through the extraterritorial extension of Section 10(b) liability.[29]

In this case, application of the U.S. securities laws to Petitioners' claims could lead to the absurd result that a U.S. court would be adjudicating a case in which 99% of NAB's shares were traded in Australia—where all the purported members of the class have adequate remedies—while leaving NAB subject to a U.S. class decision affecting 100% of its shares. Such a result acts as a significant deterrent to investment in the U.S. capital markets, and begs the question why Australian regulation and law should not govern those claims. Issuers should not be faced with such expansive and unpredictable liability under Section 10(b).

V. THIS COURT SHOULD AFFIRM THE HOLDING BELOW AND ARTICULATE A BRIGHT-LINE EXCHANGE-BASED STANDARD

For the reasons set forth above, the Court should affirm the holding below that Section 10(b) does not apply to the claims of these foreign purchasers who purchased shares of NAB on the Australian exchange.

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29. *See id.* at 50-54.

Applying Section 10(b) extraterritorially contravenes this Court's repeated interpretation of the reach of U.S. statutes, and interferes with the orderly functioning of the world's markets. As this Court has recognized: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

The Court should, however, revisit the standard to be applied to determine the applicability of Section 10(b) to claims by f-cubed plaintiffs generally. The "conduct and effects" tests—created by the Second Circuit and applied by that and other courts for the last 30 years to determine the extraterritorial reach of the Exchange Act—have resulted in unpredictable and inconsistent decisions that often focus on different aspects of the foreign securities transactions. Indeed, in their Petition for a Writ of Certiorari, Petitioners themselves pointed out that inconsistency to the Court. Cert. Pet. 10-15. Yet, the standard they propose would at once have this Court preempt the role of Congress and expand the extraterritorial reach of Section 10(b) liability, despite the absence of any supporting language in the text of the Exchange Act, while in no way eliminating the inconsistency of the "conduct and effects" tests nor their interference with foreign sovereignties.

In order to provide predictability to the international marketplace regarding the application of Section 10(b), and to end practices that offend foreign sovereignty and cast parties into a hinterland of enforcing U.S. judgments, NYSE Euronext urges this Court to set forth a rule that any action brought by a

foreign purchaser and arising out of the purchase of a foreign issuer's securities on a foreign exchange should be litigated in the country where the purchase occurred and the exchange is located. In other words, "[c]ourts should presume jurisdiction over all investors trading in a foreign issuer's securities *within* the United States, and presume *no* jurisdiction over [Section 10(b)] suits for foreign investors trading in the securities of a foreign issuer *outside* the United States." Choi & Silberman, *supra* note 16, at 506 (emphasis added).

Such a rule is consistent with the reasonable expectations of foreign investors who purchase a foreign issuer's shares on a foreign exchange and provides clear guidance to foreign issuers, regulators and investors, permitting them to accurately predict their U.S. litigation risk and potential liability under Section 10(b).

By contrast, Petitioners' proffered standard, taken from the brief submitted by the SEC as *Amicus Curiae* to the Second Circuit—that proposes to reach f-cubed claims "if the conduct in the United States is *material* to the fraud's success and forms a *substantial component* of the fraudulent scheme"—provides for virtually unbound application of Section 10(b) to foreign transactions, while ignoring the strong presumption against the extraterritorial application of U.S. laws. Pet. Br. 19 (emphasis added).

Worse still, Petitioners' proffered standard would be subject to exactly the same inconsistent and unpredictable results that have characterized the

existing tests.[30] While the words in Petitioners' test are different, there is simply no reason to believe that their application in particular cases will yield results that are any more predictable than the divergent outcomes of the last 30 years, with cases decided "on very fine distinctions." *See In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 5537 (BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006) (citation and internal quotations omitted). Interpretation of what is "significant conduct" in the United States and what is "material" to a fraud's success remains subject to the same debate that the "conduct and effects" tests have generated for decades. Petitioners' test will require courts to analyze disputes on a case-by-case basis, and will surely result in a lack of predictable guidance for future cases. This confusion is precisely the phenomenon that the court referred to in *Zoelsch* when observing that tests that "turn on a welter of specific facts" are "difficult to apply and are inherently unpredictable" and "thus present powerful incentives for increased litigation." *Zoelsch*, 824 F.2d at 32 n.2.

Moreover, because Petitioners' proposed test establishes what is plainly a lower threshold for permitting foreign plaintiffs to bring their disputes with foreign issuers before U.S. courts, there will be greater interference with foreign laws and further undermining

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30. As several courts have observed, no "cohesive doctrine" has emerged from application of the "conduct and effect" tests. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005). Instead, as Petitioners themselves stressed in their Petition for Writ of Certiorari, there has emerged "potentially incompatible statements of applicable rules." *Id.*

of foreign regulatory schemes. As a consequence, Petitioners' proposed standard will simply transform the "risk" of interference with a "foreign nation's ability independently to regulate its own commercial affairs" into a certainty. *Empagran*, 542 U.S. at 167.

In sum, an exchange-based rule provides the most guidance and predictability, while respecting the sovereign rights of other countries and aligning with the reasonable expectations of investors.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, Individually and on Behalf of All Others Similarly Situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE and W. BLAKE WILSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government.[1] OFII is charged with representing the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States at the end of 2008 was approximately $2.3 trillion. James K. Jackson (Congressional Research Service), *Foreign Direct Investment in the United States: An Economic Analysis*, at 1 (Nov. 5, 2009), *available at* http://assets.opencrs.com/rpts/RS21857_20091105.pdf. Direct investment capital inflows in 2008 totaled approximately $325 billion. *Id.* Most of that amount, roughly $242 billion, was spent to acquire direct ownership interests in U.S. companies. *Id.* at 4.

Respondent National Australia Bank ("NAB") is a defendant in this case because it invested in a U.S.

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[1] No party's counsel wrote this brief (in whole or in part), and no person other than *amicus* contributed monetarily to this brief's preparation or submission. *Amicus* is informed that, by virtue of blanket consent letters filed on December 16 & 17, 2009, by Petitioners and Respondents respectively, all parties consent to the filing of this *amicus* brief.

company. But there is no U.S. plaintiff or defendant, no U.S. stock issuer, and no U.S. securities transaction at issue, making this a classic "foreign-cubed" securities class action. If NAB can be held liable under U.S. securities laws in such circumstances, that creates a serious disincentive for foreign companies to invest in U.S. companies. As OFII's members are all U.S. subsidiaries of foreign companies, they directly benefit from foreign investment in the United States. Indeed, without such investment, many of OFII's members would not exist. OFII and its members therefore have a substantial interest in the question presented in this case, *i.e.*, whether and to what extent foreign-cubed securities class actions can proceed in U.S. courts.

OFII and others recently filed an *amicus* brief in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), explaining why the attempted expansion of private U.S. securities lawsuits in that case threatened international trade with, and investment in, the United States. That brief was cited by this Court as helpful in delineating the adverse impact that expansion of exposure to U.S. securities laws could have on foreign business investment. *Id.* at 164. It is OFII's hope and belief that the present brief will be of similar assistance to the Court, especially as this case even more directly threatens foreign trade and investment insofar as it targets a foreign company precisely because that company invested in the United States.

SUMMARY OF ARGUMENT

OFII urges the Court to hold that U.S. securities laws do not apply to "foreign-cubed" cases—where *foreign* plaintiffs, sue a *foreign* issuer of securities, based on securities transactions occurring in *foreign*

countries. *See Morrison v. National Australia Bank*, 547 F.3d 167, 172 (2d Cir. 2008) (defining "foreign-cubed" cases). Respondents and other *amici* who support them have offered a number of sound reasons why foreign-cubed cases do not belong in our courts, and OFII agrees with and joins in those arguments. In this brief, OFII offers additional reasons to affirm the Second Circuit's decision on the basis of a bright-line rule barring foreign-cubed cases in U.S. courts.

First, the extraterritorial application of U.S. law in these cases improperly disrespects foreign sovereignty because it infringes upon the *authority* of nations to regulate their own citizens and securities exchanges in the manner they see fit. This infringement of national sovereignty is even more fundamental than the conflicts in the relevant laws of various nations, which are ably demonstrated by Respondents and other *amici*, and are themselves deeply troubling. Respect for foreign sovereignty is a key precept of international law, and there is no reason to believe that Congress intended to disregard that precept in choosing to regulate U.S. securities.

Second, a bright-line rule barring foreign-cubed cases is necessary to reduce uncertainties that deter foreign investment and threaten adverse consequences for the global economy. Without a clear rule eliminating the deep uncertainty that currently exists regarding the overseas reach of our securities laws, foreign investors will continue to question the wisdom of investing in the United States, and their flight to other, more predictable legal regimes will continue. This Court's precedents have consistently urged clear jurisdictional rules, precisely to deal with concerns a case like this raises, even when the foreign defendant ultimately prevails.

I. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAW INFRINGES UPON THE AUTHORITY OF NATIONS TO REGULATE THEIR OWN CORPORATE CITIZENS AND SECURITIES EXCHANGES

In arguing for a bright-line rule prohibiting foreign-cubed cases in U.S. courts, Respondents' *amici* demonstrated before the Second Circuit why the extraterritorial application of U.S. laws in such cases conflicts with the regulatory regimes established by other sovereign nations. *See, e.g.*, *Amicus* Br. of Ass'n of Corp. Counsel at 22-23, 26-28 (filed July 12, 2007). The Second Circuit nevertheless declined to adopt a bright-line rule, discounting conflicts between U.S. and other laws because most countries are "generally in agreement that fraud should be discouraged." *Morrison*, 547 F.3d at 174-75.

OFII respectfully submits that the Second Circuit's broad assertion, even if perhaps true in the abstract, overlooks the materiality of the conflicts that exist in, for example: how various nations define corporate "fraud" (*e.g.*, does it require "reliance" and if so what does that mean?); who may seek to prove corporate fraud (*e.g.*, individual shareholders only, private plaintiffs on behalf of a class, a governmental entity?); who can be held liable for corporate fraud (*e.g.*, the corporation itself or only individual officers or directors?); and perhaps most importantly, what the appropriate remedy or punishment should be for corporate fraud. *See, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004) ("to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous

remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody").

The problem is not simply that the application of U.S. securities law in foreign-cubed cases ignores serious conflict with foreign law, although that concern is serious enough. When U.S. courts apply U.S. securities law in foreign-cubed cases they disregard the rightful authority of other nations to address disputes that by definition have a minimal connection with the United States in comparison to the home nations of the involved parties. As this Court previously has recognized, whether or not there is an actual conflict in the law, a U.S. court must respect the authority of a foreign sovereign to address a dispute that arises predominantly within the foreign sovereign's territory. That is why other nations regularly have objected to the attempted extraterritorial application of U.S. law and why, when its own interests are infringed, the United States also has complained about other nations seeking to apply their own laws to U.S. citizens.

A. This Court Has Instructed the Lower Courts to Show Respect for the Authority of Foreign Sovereigns by Carefully Limiting the Extraterritorial Application of U.S. Law

In *Empagran*, this Court prohibited extraterritorial application of U.S. antitrust laws. 542 U.S. at 159. One of the rationales for the Court's decision was its recognition that extraterritorial application of U.S. laws "creates a serious risk of interference with a foreign nation's ability to regulate its own commercial affairs." *Id.* at 165. The Court observed that the

interference with the rights of a foreign sovereign would be justified "to *redress* domestic antitrust injury that foreign anticompetitive conduct has caused." *Id.* (emphasis in original). But the Court observed that there was "no good" reason why "American law [should] supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers [*i.e.*, potential plaintiffs] from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies[.]" *Id.* at 165-66.

In other words, *Empagran* recognized that U.S. antitrust law should not apply to claims by foreign plaintiffs based upon conduct by foreign companies. In doing so, it did *not* hold that a U.S. court may apply U.S. law extraterritorially as long as there is no actual conflict in the law or disagreement regarding public policy between the U.S. and the foreign nation involved. Rather, this Court held that the driving consideration was the "risk of interference with a foreign nation's *ability* to regulate its own commercial affairs." *Id.* at 165 (emphasis added). Respect for a foreign nation's *ability* to govern is respect for that foreign sovereign's right to act as such.

In fact, *Empagran* is just the latest in a long line of this Court's jurisprudence recognizing that "interference with the sovereign authority" of other nations is itself an important reason not to apply U.S. law extraterritorially. *Id.* at 164; *see, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) ("interference with the authority of another sovereign" is a matter the "other state concerned justly might resent"); *see also, e.g.*, *Munaf v. Geren*,

__U.S.__, 128 S. Ct. 2207, 2223 (2008) (rejecting petitioners' request for *habeas* relief where such relief "would interfere with the sovereign authority" of another country).

This principle is equally if not more compelling in the context of foreign-cubed lawsuits. Extending U.S. jurisdiction beyond America's citizens and borders—*e.g.*, to foreign plaintiffs alleging injury caused by a foreign company as a result of a transaction on a foreign stock exchange—is inconsistent with this Court's longstanding respect for the legitimate legal concerns of foreign sovereigns. Application of U.S. securities laws to foreign-cubed lawsuits would be just the type of "legal imperialism" decried in *Empagran*. 542 U.S. at 164; *cf. Microsoft*, 550 U.S. at 454 ("United States law governs domestically but does not rule the world").

Indeed, failure to respect foreign sovereignty in these cases would violate clear principles of international law. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (construing Jones Act "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law"); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). "Between independent States, respect for territorial sovereignty is an essential foundation of international relations." *Corfu Channel Case (UK v. Albania)*, 1949 I.C.J. 244, at p.35 (Dec. 15); *see also, e.g., The Island of Palmas Case (US v. Neth.)*, 2 R. INT'L ARB. AWARDS 829, 838 (Perm. Ct. Arb. 1928) (similar). The responsibility to avoid interfering with the ability of foreign sovereigns to regulate their own

stock exchanges, companies, and recovery by their citizens is therefore an obligation that the United States has as a member of the international community.

To continue to fulfill America's obligations to the international community, in accord with its well-reasoned analysis in *Empagran*, this Court should again confirm that U.S. law does not apply to claims of foreign plaintiffs based upon conduct by foreign companies.

B. Sovereign Nations—Including the United States Itself—Regularly and Rightfully Object to the Extraterritorial Application of Laws Based on the Perceived Affront to Their Sovereignty

Concerns about affronting foreign sovereignty by the extraterritorial application of U.S. law are not merely abstract. Other nations—including many of America's closest allies—regularly have objected to extraterritorial applications of U.S. law of the type Petitioners and their *amici* urge. *See, e.g.*, Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 523-24 (1993) ("The United States has offended the sovereignty of other countries" by "impos[ing] its regulations on [securities] transactions that may be viewed as essentially foreign"); *Empagran*, 542 U.S. at 167-68 (discussing objections by Germany, Canada, and Japan to application of U.S. law to claims of "private foreign plaintiffs" when alleged "injuries were sustained in transactions entirely outside United States commerce"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17, 21 (1963) (accounting for "vigorous protests from

foreign governments," among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners); *In re Westinghouse Elec. Corp., Uranium Contracts Litig.*, 1978 All E.R. 434 (H.L. 1977) (attempts by the U.S. to apply its laws extraterritorially are "not in accordance with international law").

The threat to foreign sovereign interests is especially acute in cases like this, where a securities class action amalgamating thousands of claims—in a manner not permitted in the vast majority of foreign countries—is filed against a foreign corporation that is a significant "engine" for a foreign economy. As Professor John C. Coffee, Jr. observed: "the United States' foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors, and local communities." *Global Class Actions*, NATIONAL L.J., June 11, 2007, at 12.

In their own briefing on the merits, Petitioners have argued that a "flexible case-by-case" approach can ensure that sovereign interests "are not offended by each application" of U.S. law. Petitioners' Br. at 40 (filed Jan. 19, 2010). As this Court recognized in *Empagran*, however, "procedural costs and delays [associated with case-by-case litigation] could themselves threaten interference with a foreign nation's ability" to regulate its own nationals, and to make policy decisions to provide certain remedies (but not others) to injured claimants residing within its own borders. 542 U.S. at 169. In addition, as the Court recognized in *McCulloch*, the need to engage in a case-by-case "balancing" test to determine whether

U.S. law applies itself "would raise considerable disturbance . . . in our international relations as well." 372 U.S. at 19. The problems recognized in cases like *Empagran* and *McCulloch* are severely exacerbated when cases, like the one before the Court, sit for years within the U.S. court system while the parties litigate whether the case can even proceed in the U.S. courts.

Nor should foreign governments be expected or required to monitor foreign-cubed litigation and step in to object to each involved court. It is undiplomatic, even offensive, to require a foreign sovereign to file such an objection in each of the dozens of foreign-cubed securities class actions that are being filed in the United States each year—particularly when, as described above, many nations regularly have objected to *any* extraterritorial application of U.S. law.

In addition, it is unrealistic to assume that foreign sovereigns will simply continue to object in court when they feel their legitimate sovereign interests are being ignored. Some will instead choose to engage in self-help measures that will harm U.S. interests in other contexts. *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 914 (1998) (extraterritorial applications of U.S. securities laws could cause other countries to retaliate and "seek[] to regulate activities of U.S. parties that impact their countries"); *cf. McCulloch*, 372 U.S. at 21 (recognizing that infringements of foreign sovereignty caused by overbroad applications of U.S. law may "invite retaliatory action from other nations"). As this Court learned in *Empagran*, some nations have already reacted to the efforts of some U.S. courts to apply U.S. law

extraterritorially by enacting "blocking statutes" and rejecting enforcement of U.S. judgments. *See, e.g.*, *Amicus* Brief of the Federal Republic of Germany in *Empagran*, *available at* 2004 WL 226388, at *27-*28 (Feb. 3, 2004); Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 (Australia's "blocking statute," passed in response to prior extraterritorial applications of U.S. law). Whether or not appropriate, such a response is natural to a reasonably perceived insult to foreign sovereignty.

When other countries have applied their own law extraterritorially, the United States has objected and threatened adverse consequences. For example, Belgium originally attempted to extend its laws to allegations of human rights violations occurring extraterritorially. In response to Belgium's actions, the U.S. sent a strong message, noting that "Belgium appears not to respect the sovereignty of other countries. [It] needs to realize that there are consequences to its actions." Transcript of Statement by then-U.S. Secretary of Defense Donald Rumsfeld at NATO Headquarters, June 12, 2003. Belgium later eliminated universal jurisdiction concepts from its laws and required that, at a minimum, either the victim or the accused be a Belgian national. Based on pressure from a number of foreign sovereigns, including the United States, India, and China, Spain's Congress also recently passed a resolution to eliminate provisions that applied Spanish law extraterritorially to certain claims. *See* Agence France-Presse, *Spanish Lawmakers Move to Curb Foreign Human Rights Probes*, May 19, 2009, *available at* http://rawstory.com/08/news/2009/05/19spanish-lawmakers-move-to-curb-foreign-human-rights-probes/.

The American position has long been that even trial by an international tribunal, such as the International Criminal Court, would "imping[e] on the sovereignty of the United States" to the extent that it would give others an ability to second-guess U.S. policy decisions. Congressional Research Service, *U.S. Policy Regarding the Int'l Criminal Ct.*, at 3-4 (Sept. 2002). To date, other nations have frequently shown respect for American objections to their assertion of extraterritorial jurisdiction, which has avoided international incidents. The United States can only harm its international standing on such issues, however, if it insists upon asserting authority over foreign-cubed class actions. As explained in the following section, only a clear, bright-line rule that is consistent with the position the United States itself takes when the tables are turned can avoid the legitimate condemnation of foreign sovereigns.

II. A BRIGHT-LINE RULE BARRING FOREIGN-CUBED CASES IS NECESSARY TO PROVIDE CLARITY IN THE LAW AND REDUCE UNCERTAINTIES THAT HAVE ADVERSE CONSEQUENCES FOR U.S. INVESTMENT AND THE GLOBAL ECONOMY

A. The Case-by-Case Approach Urged by Petitioners and the Second Circuit Has Created Confusion and Is Contrary to This Court's Prior Precedents

As noted above, the Second Circuit in this case rejected a bright-line rule, in favor of a case-by-case analysis. In other words, the court held that each foreign-cubed case must be analyzed on its own specific facts to determine whether to assert subject matter jurisdiction. *Morrison*, 547 F.3d at 173-74.

The Second Circuit itself conceded that application of its standard "can be an involved undertaking." *Id.* at 174. Other courts discussing such *ad hoc* standards have been less generous. For example, one of the district judges in the Second Circuit observed that "any notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005).

As the district court in this case observed, "articulation of the conduct test [at issue here] is easy, its application is not . . . [The] analytical undertaking is complicated by the commercial realities that imbue modern international securities transactions. . . . The complexity of the required analysis means that individual cases are decided on very fine distinctions." *In re Nat'l Australia Bank Secs. Litig.*, 2006 WL 3844465, at *3-*4 (S.D.N.Y. Oct. 25, 2006).

Quite simply, the "flexible case-by-case" approaches espoused by some lower courts and Petitioners in this case have led to massive confusion and prolonged disputes. The case at bar is a good example. Petitioners argue before this Court that their foreign-cubed claims are permissible because they meet a test requiring conduct "predominantly" in the United States. Petitioners' Br. at 26-27. Respondents disagree with this notion. Respondents' Br. at 51 & n.33 (filed Feb. 19, 2010); Respondents' 2d Cir. Br. at

41-42 (filed July 2, 2007). What has followed is more than six years of litigation—now up to this Court—simply on the question of whether a motion to dismiss for lack of subject matter jurisdiction was properly granted in this case.

Petitioners' proposal for a "flexible case-by-case" analysis (Petitioners' Br. at 40) contravenes this Court's repeated admonitions that "jurisdictional rules should be clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989); *Hertz Corp. v. Friend*, No. 08-1107, Slip Op. at 1, 15 (U.S. Feb. 23, 2010) ("we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible"). The Court's basic rationale has been precisely to avoid the type of extensive litigation over jurisdictional matters that has gone on, not only in this case for years, but throughout the lower courts for decades now: "It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction . . . . Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465 n.13 (1990); *accord Hertz*, Slip Op. at 15 ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) (rejecting dissent's proposed rule because it "would impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation").

Judge Bork observed that it is "counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts. . . . As we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable. . . . They thus present powerful incentives for increased litigation . . . ." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987). This Court substantially clarified, by simplifying, the analysis required to determine the extraterritorial reach of U.S. antitrust laws in *Empagran*. The Court should now put an end to similar disputes about the extraterritorial reach of U.S. securities laws.

B. A Bright-Line Rule Would Reduce Risks and Uncertainties That Deter Foreign Investment in the United States

As this Court very recently reaffirmed: "Simple jurisdictional rules . . . promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, No. 08-1107, Slip Op. at 16 (U.S. Feb. 23, 2010). Predictability regarding the overseas reach of U.S. law is especially important when foreign companies are deciding whether to invest in the United States.

This Court previously has observed that U.S. securities class actions, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law . . . ." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The potential for abuse is high because U.S. securities class actions almost always involve multi-billion-

dollar prayers for relief and the promise of "protracted discovery, with little chance of reasonable resolution by pretrial process." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); *accord Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006).

Based in part on an *amicus* brief filed by OFII and others, the Court also has recognized that the expansion of liability under U.S. securities law "raise[s] the costs of doing business" in America, such that "[o]verseas firms with no other exposure to [U.S.] securities laws could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (citing OFII *amicus* brief).

Similar to petitioners in *Stoneridge*, Petitioners and their *amici* in this case seek a rule that would deter foreign investment in the United States. Discouraging such investment not only has adverse consequences for U.S. companies who are subsidiaries of foreign corporations, but it also substantially harms both the U.S. and global economies generally. What Petitioners refer to as a "flexible case-by-case" approach to foreign-cubed class actions (Petitioners' Br. at 40), well-intentioned or not, is a prescription for uncertainty—which, in investment terms, translates into inestimable financial risk. As this case and many others demonstrate, parties will litigate for years the question of whether an alleged set of facts allows a foreign-cubed class action to proceed in the United States, regardless of what "flexible" standard is adopted.

Exacerbating the problem, the threat posed by class actions against foreign issuers is only increasing. In 2008 (the last full year for which data was

available), 36 such class actions were filed in U.S. federal courts, up from 14 in 2006 and 27 in 2007. In 2008, claims against foreign issuers accounted for 17 percent of all federal securities class actions filed that year. Pricewatershouse Coopers LLP, *2008 Securities Litigation Study*, at 43 (Apr. 1, 2009), *available at* http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF.

The uncertainty of jurisdictional rules governing foreign-cubed cases, particularly when coupled with the substantial costs and exposure posed by even meritless class actions, creates financial risk and causes foreign companies to be fearful of investing in the United States. *See, e.g.*, John C. Coffee, Jr., *Global Class Actions*, NATIONAL L.J., June 11, 2007, at 3 n.3 (the "fear of U.S. private antifraud litigation" is tied to the "growing disenchantment of foreign issuers with the U.S. market"). As the Australian Chamber of Commerce and Industry recently observed:

> The extraterritorial application of national laws by some countries, notably the USA, has created uncertainty and added cost to the operation of businesses involved in international trade and commerce. Beyond the standard risks, . . . businesses operating across national borders are confronted with the added burden of potential uncertainty in legal jurisdiction.

Australian Chamber of Commerce and Industry, *The Extra Territorial Application of National Laws: An Unwarranted Burden for International Business*, 138 ACCI REVIEW 9, 12 (Aug. 2006).

The Australians are by no means alone in their concerns. The International Chamber of Commerce also has recognized that the extraterritorial application of laws "creates considerable commercial and legal uncertainty. This uncertainty discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international business." *Policy Statement on Extraterroriality and Business*, at 2 (July 13, 2006).

In the mid-2000s, a survey of hundreds of business leaders commissioned by United States Senator Charles Schumer and New York Mayor Michael Bloomberg found that "a fair and predictable legal environment" was ranked second (behind only the skill of the labor force) amongst the most important factors considered in making investment decisions. *Sustaining New York's and the U.S.'s Global Financial Services Leadership* ("Schumer-Bloomberg Report"), Jan. 2007, at 15-16. Foreign companies responded to the survey by stating that they were less likely to invest in the United States than ever before because they perceive risks posed by, among other things, "the increasing extraterritorial reach of U.S. law and the unpredictable nature of the [American] legal system." *Id.* at 73-77; *see also, e.g.*, United States Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 2 (Oct. 2008) ("The U.S. share of global FDI [foreign direct investment] has declined since the 1980s and the competition to attract FDI has grown more intense."). Survey respondents bluntly noted that there is concern about investing in the United States because it is "harder to manage legal risk in the U.S. than in many other jurisdictions." Schumer-Bloomberg Report, *supra*, at 77.

To establish the predictability needed by foreign companies if they are to continue to invest in the United States, *amicus* respectfully requests that this Court establish a clear rule rejecting U.S. jurisdiction in foreign-cubed class actions. *See, e.g.*, Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 WIS. L. REV. 465, 500 (2009) (listing many reasons why clarity would provide an "appealing rule").

CONCLUSION

Allowing foreign-cubed class actions to proceed in U.S. courts infringes upon the authority of sovereign nations to regulate their stock exchanges and companies, and provide remedies to their citizens, as they see fit. The "flexible case-by-case" approach urged by Petitioners and others "is at war with administrative simplicity." *Hertz*, Slip Op. at 13. It has led to years of litigation in this case—and many others—over threshold jurisdictional questions alone. Such litigation not only harms judicial efficiency, but also creates uncertainty and risk that poses adverse consequences for the U.S. and global economy. This Court should put an end to litigation over foreign-cubed class actions in the United States.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE*, PROFESSORS AND STUDENTS OF THE YALE LAW SCHOOL CAPITAL MARKETS AND FINANCIAL INSTRUMENTS CLINIC, IN SUPPORT OF RESPONDENTS

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BRIEF OF PROFESSORS AND STUDENTS OF THE YALE LAW SCHOOL CAPITAL MARKETS AND FINANCIAL INSTRUMENTS CLINIC AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Professors and Students of the Yale Law School Capital Markets and Financial Instruments Clinic respectfully submit this brief as *Amici Curiae* in support of Respondent.[1]

INTEREST OF *AMICI CURIAE*

Amici are professors and students at Yale Law School who are members of the Capital Markets and Financial Instruments Clinic. The Clinic is a collaborative effort of students and faculty to generate comment letters regarding proposed financial regulations and *Amicus* briefs in pending cases involving corporate governance and capital markets.

Amici have no financial interest in Respondents or direct personal interest in the case. They file this brief because the Second Circuit's decision and parties' briefs fail to address important concerns

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae*, or its counsel, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of all *Amici* briefs have been filed with the Clerk of the Court.

related to the extraterritorial application of the fraud-on-the-market doctrine at issue. Failure to address these concerns could result in Supreme Court precedent with detrimental effects on global capital markets and the U.S. federal court system.

SUMMARY OF ARGUMENT

This case presents the Supreme Court with a question of first impression, namely, whether to extend the fraud-on-the-market doctrine to class actions in which plaintiffs purchased securities on overseas exchanges. The fraud-on-the-market doctrine allows plaintiffs in class action suits under 17 C.F.R. § 240.10b-5 ("Rule 10b-5") to proceed without ever proving that they directly relied on the defendant's misrepresentation or omission when purchasing securities. Importantly, most countries have not adopted the doctrine, and it only applies to securities transactions on efficient markets supported by robust regulatory regimes.

Petitioners, Respondents, and the Second Circuit's decision all overlook the critical importance of this doctrine to the case at bar. Although the Plaintiff-Petitioners' complaint rests on the fraud-on-the-market doctrine, Petitioners' brief at this stage of litigation omits mention of the doctrine entirely. Respondents, meanwhile, mention the fraud-on-the-market dimension of this case only in passing. And although the Second Circuit sided with Respondents, its refusal to articulate any "bright-line" rules regarding extraterritorial application of Rule 10b-5 left open the possibility that future plaintiffs would be able to assert fraud-on-the-

market claims arising out of foreign securities transactions.

Amici believe that, in the interest of international comity, the Court cannot ignore the fraud-on-the-market dimension of the instant case. We urge the Court to adopt a bright-line rule that the fraud-on-the-market doctrine does not extend to securities transactions on foreign exchanges. This holding would be consistent with four decades of Rule 10b-5 jurisprudence in the circuit courts up until the Second Circuit's *Morrison* decision.

On the one hand, we are mindful of Judge Friendly's concern that too narrow a construction of the Securities Exchange Act's geographic scope would allow the U.S. to become a base for transnational fraudulent activity. On the other hand, any extraterritorial application of the fraud-on-the-market doctrine sets U.S. courts on a collision course with the substantive laws of other sovereign states. Worse yet, it would force U.S. courts to serve as "schoolmasters" for global capital markets—giving pass-or-fail grades to the regulatory regimes of other countries. A bright-line rule restricting the fraud-on-the-market doctrine to domestic exchanges would address these comity concerns without generating any risk that the U.S. would become a safe haven for securities scammers.

Since the fraud-on-the-market doctrine is a necessary component of Petitioners' claim for relief, their claim can only succeed if the doctrine applies to securities transactions on foreign exchanges. The doctrine does not apply. As a result, Respondents

properly moved to dismiss this suit for failure to state a claim, and the District Court's dismissal of the suit should be affirmed.

ARGUMENT

I. Petitioners' Claim For Relief Requires The Supreme Court to Extend Fraud-on-The-Market Doctrine To Securities Transactions On Foreign Exchanges

In a private cause of action under Rule 10b-5, "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element" of a plaintiff's claim for relief. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988).

The "fraud-on-the-market" doctrine provides that on efficient stock exchanges, "[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in the market price, an investor's reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247. Unlike the United States, most jurisdictions have not adopted the fraud-on-the-market doctrine.[2]

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[2] *See, e.g., Carom v. Bre-X Minerals Ltd.*, 41 O.R. 3d 780, 793 (Ont. Ct. Gen. Div. 1998) ("there is no support in the common law for the plaintiffs' assertion that a presumption of reliance

In their claim for relief under Rule 10b-5, Plaintiff-Petitioners allege that they "have suffered substantial damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for N[ational] A[ustralia] B[ank] securities . . . ." Pls.' Br. 47. But this harm occurred on an *Australian* rather than an American stock exchange. Thus, unless the Supreme Court extends the fraud-on-the-market doctrine to other jurisdictions' exchanges, Petitioners have failed to meet the reliance requirement of a private cause of action under Rule 10b-5 and therefore failed to state a claim for which relief can be granted.[3]

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may arise as a matter of law"); Eilís Ferran, *Are US-style Investor Suits Coming to the UK?*, 9 J. Corp. L. Stud. 315, 327 (2009) (noting that "[t]he classic 'fraud on the market' theory developed in US securities law . . . has not been adopted" in the UK); *Id.* at 336 (noting that "fraud on the market doctrine has not been adopted in Australia"); Hans Tjio, *Enforcing Corporate Disclosure*, 2009 Sing. J. Legal Stud. 332, 349 (2009) (noting that Singapore has not adopted fraud-on-the-market theory); Theodor Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 Am. J. Comp. L. 31, 71 n.89 (2005) (contrasting the German requirement of actual reliance with the U.S. fraud-on-the-market doctrine); Hubert De Vauplane & Odile Simart, *The Concept Of Securities Manipulation And Its Foundations in France and the USA*, 23 Brook. J. Int'l L. 203 (1997) (noting that the fraud-on-the-market doctrine has not been adopted in France).

[3] At the district court level, Defendant-Respondents moved to dismiss the complaint of the Plaintiff-Petitioners for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *In re Nat'l Austl. Bank Sec. Litig.*, 2006 U.S. Dist. LEXIS 94162, at *3 (S.D.N.Y. Oct. 25, 2006). Regardless of whether the claim survives on 12(b)(1) grounds, it fails on

II A Bright Line Rule Limiting The Fraud-On-The-Market Doctrine To Domestic Exchanges Would Be Consistent With Four Decades of Circuit Court Jurisprudence

A. The circuit courts' standards for the geographic scope of Rule 10b-5 were not developed with fraud-on-the-market in mind

The extraterritorial application of Rule 10b-5 grew out of a set of Second Circuit decisions written by Judge Friendly that did not involve the fraud-on-the-market doctrine. Indeed, they came years before the Supreme Court first allowed fraud-on-the-market claims in *Basic, Inc.* *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) (Friendly, C.J.); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (Friendly, C.J.). *See also Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968).

Other circuits' decisions extending the extraterritorial reach of 10b-5 also did not involve the fraud-on-the-market doctrine. Most came down before *Basic, Inc.* *See Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir. 1984); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977). While the Fifth

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12(b)(6) grounds if the fraud-on-the-market doctrine is not extended to foreign exchanges.

Circuit adopted its standard for the extraterritorial application of Rule 10b-5 after *Basic, Inc.*, it also did so outside the fraud-on-the-market context. *See Robinson v. TCI/US W. Commc'ns*, 117 F.3d 900, 903 (5th Cir. 1997) (in which the England-based plaintiff-appellant alleged that U.S. defendants deliberately defrauded him of a $9 million interest in a settlement agreement).

B. The concerns that led circuit courts to extend the reach of Rule 10b-5 do not apply to the fraud-on-the-market doctrine

Although "[t]he circuits are divided as to precisely what sort of activities" abroad might give rise to Rule 10b-5 claims, "all agree that . . . Congress did not want 'the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners.'" *Robinson*, 117 F.3d at 905 (citing *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, C.J.)). *See also Cont'l Grain*, 592 F.2d at 420 (quoting Friendly and acknowledging "that the finding . . . in the present case is largely a policy decision"); *Kasser*, 548 F.2d at 114 (holding Friendly's rationale "sets forth a sound proposition . . . which we now adopt"). In *Morrison*, the Second Circuit explained the reasoning behind Friendly's concern: if the United States "decline[s] jurisdiction over all 'foreign-cubed' securities fraud actions," it will "be seen as a safe haven for securities cheaters." *Morrison v. Nat'l Austl. Bank, Ltd.*, 547 F.3d 167, 175 (2d Cir. 2009).

However, this concern does not apply in the

fraud-on-the-market context because almost all other jurisdictions *reject* that doctrine. *See supra* note 2. Countries will not look askance at the U.S. for declining to apply a doctrine that they themselves reject. Under the rule suggested by the *Amici*, foreign plaintiffs would still be able to seek relief in U.S. courts if they have fallen victim to "fraudulent security devices" exported from our shores. All that *Amici* ask is for plaintiffs who present 10b-5 claims arising out of foreign securities transactions to actually allege that they were deceived by these devices. Plaintiff-Petitioners' pleadings in the instant case do not meet this minimal standard.

Petitioners and the *Morrison* panel also overlook Judge Friendly's *own* repeated recommendations that courts apply a different, more stringent standard for the geographic scope of 10b-5 in non-traditional securities class actions. In *Vencap*, Judge Friendly ruled that a U.S. district court could assert jurisdiction over claims brought by Luxembourg-based plaintiffs who alleged that a U.S.-citizen defendant had sought to "spirit[] away" $3 million of plaintiffs' assets. 519 F.2d at 1019. But Judge Friendly cautioned that "[c]lass actions may stand differently" because of "the likelihood that a very small tail" of plaintiffs who prefer to adjudicate the dispute in U.S. courts "may be wagging an elephant" of foreign victims who would prefer to pursue their claims in their home jurisdiction. *Id.* at 1018 n.31. Similarly, in *Bersch*, Judge Friendly warned that "[t]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts," especially

"when the class members . . . are abroad." 519 F.2d at 996. Fraud-on-the-market class actions—which encompass *all* purchasers of a particular security regardless of whether they actually relied on a defendant's misrepresentation—raise exactly these concerns about "wagging an elephant" and "overtax[ing] district courts." *See infra* note 8.

III. A Bright-Line Rule Limiting Fraud-On-The-Market Doctrine To Domestic Exchanges Would Avoid Clashes Between U.S. And Foreign Law

A. Applying fraud-on-the-market doctrine to foreign exchanges would interfere with the substantive laws of other nations

When "applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute," U.S. courts should "refrain from exercising that jurisdiction with respect to a person or activity having connections with another state." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818-821 (Scalia, J., dissenting). Other jurisdictions' decisions not to adopt the fraud-on-the-market doctrine constitute such a difference in substantive law. These jurisdictions did not merely decline to adopt fraud-on-the-market. They deliberately rejected it after careful consideration and reflection.

For instance, New Zealand's Judge Blanchard, in rejecting the fraud-on-the-market doctrine, stated that "the purpose of the [New Zealand Securities Act 1978] is to ensure information is available to

investors, so that they can make their *own* assessment of the prospects of the issuer . . . ." *Boyd Knight v. Purdue*, 1999 NZLR LEXIS 406, at *42 (C.A. Wellington) (emphasis added). Judge Blanchard did *not* want to encourage investors to make financial decisions "without troubling to look at the accounts." *Id.* He found "no attraction in the doctrine of reliance on the integrity of the market which has been developed in some jurisdictions in the United States." *Id.* at *43. Justice La Forest of the Supreme Court of Canada, in explaining his country's decision to reject fraud-on-the-market doctrine, expressed concern that if the theory were incorporated into Canadian case law, the legal costs associated with preparing financial statements "would inevitably swell." *Hercules Mgmt. Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165, 196 (Can.). *See also Carom*, 41 O.R. 3d at 782 (the "doctrine of American law known as fraud on the market theory . . . invokes a presumption unknown up to the present in Canadian law").[4]

It may be true, as the Second Circuit argues, that "governments and other regulators are generally in agreement that fraud should be discouraged. . . . [I]f

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[4] Similarly, "[t]here is no statutory presumption of reliance in relation to actions by shareholders for compensation in Australia." *See* Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss From Securities Nondisclosure in the United States, Canada, and Australia*, 29 Melbourne L. Rev. 621, 655 (2005). Although Professor Duffy considers the possibility that Australian courts may allow fraud-on-the-market claims in the future, *see id.* at 664, this is no reason for U.S. courts to preempt a sovereign state's development of its own case law.

our anti-fraud laws are stricter than a foreign state's, that country will surely not be offended by their application." *Morrison*, 547 F.3d at 175 (citing *IIT, Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980) (Friendly, C.J.)). But it does not follow that *any* difference in anti-fraud regimes between countries simply reflects "stricter" enforcement in one. In the case of the fraud-on-the-market doctrine, differences between countries explicitly reflect different substantive legal regimes.[5] To impose the American regime on other countries would violate principles of international comity.

B. Applying the fraud-on-the-market doctrine to foreign exchanges would require U.S. courts to pass judgment on other countries' regulatory regimes

Plaintiffs may only rely on the fraud-on-the-market doctrine where they "allege and prove . . . that the shares were traded on an efficient market

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[5] The geographic scope of fraud-on-the-market doctrine need not be coextensive with the geographic scope of other Rule 10b-5 claims. "[In cases of] 'core' securities fraud—that is, intentionally deceptive misrepresentation designed to line the pockets of the issuer or some broker or investment adviser—there is little problem in the conclusion that multiple countries could seek to exercise both subject matter and personal jurisdiction. Core fraud is considered to be an evil in all civilized countries . . . ." Donald C. Langevoort, Schoenbaum *Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 Law & Contemp. Probs. 241, 245 (1992). The extraterritorial extension of fraud-on-the-market doctrine is particularly problematic because the doctrine is distinctly American and is *not* adopted by "all civilized countries."

. . . ." *Basic, Inc.*, 485 U.S. at 248 n.27. In an efficient market, "unexpected corporate events or financial releases" generate "an immediate response in the stock price." *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999) (citing *Cammer v. Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989)). "This, after all, is the essence of an efficient market and the foundation for the fraud on the market theory." *Cammer*, 711 F. Supp. at 1287.[6]

This criterion can only be satisfied when a security trades on a market governed by an effective regulatory regime. If, for example, a jurisdiction fails to enforce anti-insider-trading laws, prices may not react to the announcement of corporate events or financial releases because corporate insiders who heavily trade their own firm's securities anticipated the announcement or release in advance. *See, e.g.*, Arturo Bris, *Do Insider Trading Laws Work?*, 11 Eur. Fin. Mgmt. 267 (2005). Moreover, "in countries that provide poorer protection for public investors," traders may not trust the credibility of corporate disclosures, and this will "impede the capitalization of firm-specific information into stock prices." Randall Morck et al., *The Information Content of Stock Markets: Why Do Emerging Markets Have Synchronous Stock Price Movements?*, 58 J. Fin. Econ. 215, 216-217 (2000) (noting that stock prices in

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[6] This inquiry requires courts not only to look at the characteristics of the "whole market," but also to the "characteristics of the individual stock itself." *Cammer*, 711 F. Supp. at 1281. In applying fraud-on-the-market abroad, then, U.S. courts would have to assess the efficiency of particular foreign exchanges with respect to particular foreign securities.

emerging markets do *not* appear to integrate firm-specific information efficiently).

Thus, the extraterritorial application of the fraud-on-the-market doctrine would require U.S. courts to deem at least some foreign regulatory regimes deficient. Such a statement from a U.S. court surely would offend other countries. *Cf. Nanus Asia Co. Inc. & Anor v. Standard Charter Bank*, [1988] 1 H.K.C. 377 (H.C.) (in which a Hong Kong court took offense at a U.S. district judge's suggestion that Hong Kong's securities regulatory regime was lax).

U.S. courts should not be in the business of deciding whose securities regulations pass muster and whose fall short. They should presume that Congress did not intend U.S. judges to act as schoolmasters for global securities markets — giving high grades to some and failing marks to others. "[P]rescriptive comity . . . is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted." *Hartford Fire Ins.*, 509 U.S. at 817 (Scalia, J., dissenting). U.S. courts are instructed to interpret a statute's geographic scope narrowly when "the extra-territorial operation of the statute would impugn foreign law." *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 173 F. Supp. 369, 377 (S.D.N.Y. 1959).[7]

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[7] Petitioners suggest that "[c]oncerns relating to comity can . . . be addressed by application of the *forum non conveniens* doctrine." Pet'rs' Br. 41. *Cf. Warlop v. Lernout*, 473 F. Supp. 2d

Beyond concerns of comity, country-by-country and exchange-by-exchange determinations of market efficiency would severely strain the resources of U.S. federal courts. Proof of a particular market's efficiency would require "[e]xpensive experts with complex equations and long computer printouts." *See* Geoffrey Christopher Rapp, *Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in* Cammer v. Bloom *and Its Progeny*, 10 U. Miami Bus. L. Rev. 303, 319-320 (2002). These efficiency tests will be especially challenging to conduct when courts are unfamiliar with the markets at issue.[8] It not only

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260, 263 (D. Mass. 2007) (dismissing foreign plaintiffs' fraud-on-the-market claims against Belgium-based defendants under the doctrine of *forum non conveniens*). However, since Congress never intended the fraud-on-the-market doctrine to apply to foreign securities exchanges, Petitioners' claims do not survive Respondents' motion to dismiss under Fed. R. Civ. P. 12(b)(6) whether the forum is "convenient" or not. Moreover, if fraud-on-the-market suits based on foreign securities transactions necessarily raise comity concerns, as *Amici* argue, then it would be a waste of litigants' and judges' time to delay dismissal at this stage when the suit will be transferred to a foreign court regardless. *Cf. Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . . .").

[8] For instance, courts assessing the efficiency of the market for a domestically-traded security generally look to whether a stock has "numerous market makers." *See Cammer*, 711 F. Supp at 1286. But "a trading system based on market makers is the exception rather than the rule outside North America." Hee-Joon Ahn & Yan-Leung Cheung, *The Intraday Patterns of the Spread and Depth in a Market Without Market Makers: The Stock Exchange of Hong Kong*, 7 Pacific-Basic Fin. J. 539, 540 (1999). A U.S. court considering the efficiency of a foreign market would find itself on *terra incognita*, and the guidelines

would be *impolitic* to extend fraud-on-the-market extraterritorially. It would be *impractical* as well.

IV. The Fraud-On-The-Market Doctrine Does Not Apply To ADR Transactions Because The ADR Market Is Not Efficient

At the circuit court level, Plaintiff-Appellants (now Petitioners) cited the fact that National Australia Bank's securities trade as American Depository Receipts (ADRs)[9] on the New York Stock Exchange as a "tipping factor[]" supporting subject matter jurisdiction. Pl-Appellants' Br. 45. *See also* Pet'rs' Br. 5 n.2. Some commentators have suggested that foreign plaintiffs should be able to ride the jurisdictional coattails of domestic ADR purchasers in fraud-on-the-market claims. *See, e.g.*, Hannah L. Buxbaum *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 282 (2006); Brian P. Murray & Maurice Pesso, *The Accident of Efficiency: Foreign Exchanges, American Depository Receipts, and Space Arbitrage*, 51 Buff. L. Rev. 383 (2003). Petitioners' *Amici* similarly argue that the sale of ADRs based on National Australia Bank's stock should allow a U.S. district court to hear foreign investors' fraud-on-the-market claims. MN Br. 4.

This argument is only tenable if (1) the ADR market operates efficiently and (2) price movements

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that courts use to evaluate efficiency in the domestic context would not necessarily apply.

[9] "ADRs are issued by U.S. depository banks and represent one or more shares of foreign stock or a fraction of a share. If you own an ADR, you have the right to obtain the foreign stock it represents." *Morrison*, 547 F.3d at 168 n.1.

pass seamlessly to and from the ADR and overseas markets. Neither assumption holds true.

First, "[t]he 'fraud on the market' theory rests on the assumption that there is a nearly perfect market in information . . . ." *Peil v. Speiser*, 806 F.2d 1154, 1161 n.10 (3d Cir. 1986). But "because the ADR market is less liquid and tends to have more information asymmetries . . . investors will . . . be less willing to fully react to public announcements." Georgina Benou, *Market Underreaction to Large Stock Price Declines: The Case of ADRs*, 4 J. Behav. Fin. 21, 22 (2003). Moreover, if "[i]nvestors . . . hold ADR stocks for different reasons than the other stocks in their portfolios"—i.e. to diversify risk rather than beat the market rate of return—they may "be hesitant to react once negative news is out." *Id. See also* Diane Deqing Li & Kenneth Yung, *Institutional Herding in the ADR Market*, 23 Rev. Quantitative Fin. & Acct. 5, 16 (2004) (observing that in the ADR market, "past winners continue to be winners, and past losers continue to be losers"—which is inconsistent with market efficiency).

Second, "if the markets are fully efficient and the prices of underlying shares truly affect the prices of ADRs, a shock from the underlying share price should be reflected in the prices of ADRs by the same calendar day." Minho Kim, *et al.*, *Price Transmission Dynamics Between ADRs and Their Underlying Securities*, 24 J. Bank. & Fin. 1359, 1362 (2000). However, ADR prices do not fully integrate shocks to the prices of foreign underlying shares in the first twenty-four hours. *Id.* at 1373. This time lag persists particularly long for ADRs based on Australian

shares. *Id.*

Moreover, it appears that "U.S. investors initially attempt to price the ADRs partly with reference to their own [i.e. U.S.] market, rather than to the foreign market in which the underlying shares trade." *Id.* at 1378. This finding "is inconsistent with . . . market efficiency." Robert B. Durand & Douglas Scott, *iShares Australia: A Clinical Study in International Behavioral Finance*, 12 Int'l Rev. Fin. Analysis 223, 237 (2003) (noting that ADRs of Australian securities track U.S. macro-market movements more than underlying shares). *See also* Junming Hsu & Li-Hwei Tsai, *An Investigation of Information Transmission Between Stocks of Far Eastern Countries and Their American Depository Receipts*, 44 Emerging Markets Fin. & Trade 40, 56 (2008) (finding that price transmission between Asian stock exchanges and the ADR market is "not fully efficient" and that "returns between domestic stocks and their ADRs . . . differ substantially in the short run").

Since (1) ADRs based on a company's overseas stock underreact to available information regarding the company and its business and (2) mechanisms of price transmission to and from overseas and ADR markets operate imperfectly, ADR transactions on U.S. exchanges should not enable foreign or domestic plaintiffs to rely on the fraud-on-the-market doctrine in class-action suits.

In sum, ADR transactions alone cannot support the application of fraud-on-the-market doctrine in the instant case. Thus unless fraud-on-the-market

doctrine applies to foreign securities exchanges, Petitioners have failed to state a claim for which relief can be granted. This Court—in the interest of comity—should rule that the fraud-on-the-market doctrine does not apply to foreign exchanges as a matter of law. Thus Petitioners' claim likewise fails as a matter of law. Since Respondents' motion to dismiss for lack of subject matter jurisdiction was accompanied by a motion to dismiss for failure to state a claim, Respondents should prevail at this stage of the litigation even if the Court accepts all the arguments regarding subject matter jurisdiction asserted in Petitioners' brief.

CONCLUSION

For the foregoing reasons, the lower courts' decisions dismissing Petitioners' claims should be affirmed—albeit on grounds different from those asserted in the Second Circuit's opinion.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, ET AL.,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

No. 08-1191

ROBERT MORRISON, ET AL.,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE* [1]

The Republic of France has a substantial interest in the application of its laws to its citizens and residents who transact in securities on exchanges located on French territory. France has its own reticulated regime of securities regulation and enforcement that rests on legal traditions and policy

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, its staff, or its counsel made a monetary contribution to the preparation or submission of this brief. Written consents of the parties to the filing of *amici curiae* briefs have been filed with the Court.

judgments that are of fundamental importance to France, are shared with many countries, and differ in important respects from those of the United States. Among the differences are a greater role for government as opposed to private regulation and enforcement, as reflected in the reliance on public actions (*l'action publique*) rather than private class actions, and a concern with the procedural fairness of certain forms of class action that purport to bind persons who have taken no affirmative steps to participate in the collective lawsuit (the opt-out class action).

In addition to those policy concerns, France has a practical concern with the financial burden of settlements and judgments in potentially world-wide securities class actions on corporations organized under French law and the concomitant economic effects on French workers, French shareholders, and other stakeholders in France. In response to that concern, the Ministry of Justice of France has supplied correspondence in connection with securities class actions in federal trial courts. *See In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 287 (S.D.N.Y. 2008).

The extraterritorial application of U.S. securities fraud laws at the behest of plaintiffs who are not citizens or residents of the U.S., against defendants who are not citizens or residents of the U.S., for frauds perpetrated on exchanges that are not within the territory of the U.S., does not respect the laws and public policies of those foreign nations in which the parties reside and under which the exchanges operate. Extraterritorial application of U.S. securities fraud law interferes with the ability of foreign nations to regulate their own financial markets and craft remedies that they deem appropriate and

consistent with their own legal traditions and policy judgments.

The Republic of France believes that agreements between sovereign governments represent the most productive way to reconcile and coordinate the potentially conflicting interests of national securities regulators.

SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), should not be applied to alleged frauds perpetrated by foreign defendants against foreign plaintiffs on foreign securities exchanges, as a matter of comity to the laws and public policies of the foreign nations in which those parties reside and under whose laws those securities exchanges are regulated.

I. Generally speaking, international comity counsels against expansive extraterritorial application of the Exchange Act. International comity principles are reflected in four doctrines: the presumption against extraterritoriality, construing statutes to avoid unreasonable interference with foreign sovereignty, choice-of-law principles, and *forum non conveniens* doctrine. All four doctrines counsel against the application of the U.S. securities laws to cases that involve predominantly foreign interests and therefore interfere with the sovereign authority of foreign nations.

II. As applied to foreign-cubed securities fraud actions, international comity principles preclude application of the anti-fraud rules of U.S. securities laws because the U.S. interest is attenuated and the foreign interest is paramount. While no nation (to our knowledge) condones securities fraud, nations pro-

scribe securities fraud using incompatible regulatory schemes. For example, while the U.S. permits private plaintiffs to enforce anti-fraud provisions in class actions, France and many other nations have made a considered policy choice to rely instead on public actions. In addition, certain aspects of the U.S. approach conflict with specific legal rules of foreign nations. For example, the opt-out aspect of U.S. class actions runs afoul of fundamental French public policy and due process principles.

III. Foreign-cubed securities fraud actions should not be permitted to proceed in U.S. courts because they violate international comity principles as a class. A case-by-case application of international comity principles to foreign-cubed actions would itself disserve those principles by drawing foreign parties into U.S. courts to litigate foreign securities transactions that are more properly the domain of the laws, regulations, and public policies of other nations.

ARGUMENT

SECTION 10(b) OF THE EXCHANGE ACT DOES NOT APPLY TO ALLEGED FRAUDS PERPETRATED BY FOREIGN DEFENDANTS AGAINST FOREIGN PLAINTIFFS ON FOREIGN SECURITIES EXCHANGES

The question presented is whether Section 10(b) of the Exchange Act should be applied to "foreign-cubed" securities actions – *i.e.*, cases in which "foreign claimants fil[e] actions in U.S. courts that arise out of foreign defendants' securities offerings on foreign exchanges – hence the 'cubed' nature of the foreign elements."[2]

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[2] Note, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b) Superiority Inquiries for Foreign Cubed Class Action*

In the view of the Republic of France, the answer to that question should be "no." Longstanding legal doctrines based on international comity support a categorical rule against the application of U.S. securities law to claims of foreign investors seeking redress against foreign corporations for harm suffered in foreign securities markets.

I. INTERNATIONAL COMITY COUNSELS AGAINST BROAD EXTRATERRITORIAL APPLICATION OF THE EXCHANGE ACT

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). International comity underlies several doctrines of U.S. law that militate against an expansive application of the U.S. securities fraud laws, including (A) the presumption that Congress did not intend extraterritorial application; (B) this Court's practice of construing statutes to avoid unreasonable interference with foreign sovereignty; (C), choice-of-law principles; and (D) the doctrine of *forum non conveniens*.

A. The Presumption that Congress Did Not Intend Extraterritorial Application

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian*

Securities Litigations, 48 COLUM. J. TRANSNAT'L L. 114, 115 (2009).

Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 284 (1949)), *superseded by statute on other grounds*. For two centuries, this Court has consistently applied that principle to a wide variety of statutes. *See, e.g., United States v. Palmer*, 16 U.S. 610, 630-31 (1818) (Act of 1790); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) (Federal Employees Liability Act); *Foley Bros.*, 336 U.S. at 290 (1949) (Eight-Hour Law); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (Foreign Sovereign Immunities Act); *Smith v. United States*, 507 U.S. 197, 203-05 (1993) (Federal Tort Claim Act); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993) (Immigration & Nationality Act); *Small v. United States*, 544 U.S. 385, 388-89 (2005) (Federal Firearms Statute).

The presumption against construing U.S. laws to apply extraterritorially serves important interests. To begin with, it recognizes that Congress is "primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. Additionally, the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248 (citation omitted). At bottom, the presumption recognizes that "United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). Thus, an Act of Congress will be found to have extraterritorial reach only if there is an "affirmative intention of the Congress *clearly expressed*" to do so. *Aramco*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)) (emphasis added).

As the court of appeals below correctly found, Congress did not "clearly express[]" an "affirmative intention" to apply Section 10(b) of the Exchange Act extraterritorially. Pet. App. 6a-7a. Section 10(b) itself expresses no intention to regulate "[m]anipulative and deceptive devices" extraterritorially. 15 U.S.C. § 78j(b) (referring to the use of such devices in connection with the purchase or sale of securities registered or not registered "on a *national* securities exchange") (emphasis added). The only section of the Exchange Act that refers to "[f]oreign securities exchanges" is Section 30. 15 U.S.C. § 78dd. But that section authorizes the SEC to regulate transactions on foreign exchanges only by brokers and dealers in the securities of U.S. issuers, not foreign issuers. *Id.* § 78dd(a).

What is more, Section 30 specifically provides that nothing in the Exchange Act or the Commission's rules and regulations may apply to a business in securities transactions "without the jurisdiction of the United States" unless such rules and regulations are "necessary or appropriate to prevent the evasion" of the Exchange Act. *Id.* § 78dd(b). That purpose "rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Bork, J.). Because foreign-cubed securities fraud actions seek to redress harm to foreign investors and markets, those actions seem plainly outside the scope of the authority that Congress exercised in the Exchange Act.[3]

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[3] Petitioners and certain of their *amici* read Section 30(a) and the definition of "interstate commerce," which includes commerce between the U.S. and a foreign state, as contemplating

Nor does the legislative history of the Exchange Act support the extraterritorial application of Section 10(b). To begin with, statements not passed by both Houses of Congress and presented to the President would seem by their nature to lack the clarity required to satisfy clear-statement rules such as the presumption against extraterritorial application. But even if statements in the legislative history of an Act of Congress could, in principle, "clearly express[]" an "affirmative intention" to legislate extraterritorially (*Aramco*, 499 U.S. at 248), nothing in the legislative history of the Exchange Act expresses any extraterritorial ambitions, let alone an intention to regulate foreign-cubed securities frauds.

To the contrary, the congressional hearings and committee reports focus on the manipulation and deception of American investors by Wall Street on 34 exchanges located in the United States – what might be called *American*-cubed securities frauds.[4]

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extraterritorial application of the Exchange Act. *E.g.*, Pet. Br. at 23-24, 39-40. But the invocation of the foreign commerce clause does not itself reflect an intention by Congress to legislate extraterritorially. *See Aramco*, 499 U.S. at 251 ("even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad"). Moreover, that Congress specified limited extraterritorial application for a specific purpose does not qualify as a clear, affirmative congressional expression of intent to legislate extraterritorially for other purposes. *Cf. Microsoft*, 550 U.S. at 456 ("'[T]he presumption is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application'; it remains instructive in determining the *extent* of the statutory exception.") (emphasis in original; internal citations omitted).

[4] S. REP. NO. 73-1455, at 7 (1934) ("Fletcher Report"). For discussion of the manipulative devices, see Fletcher Report at 30-55; see also, *e.g.*, S. REP. NO. 73-792, at 2-5 (1934); H.R. REP. NO. 73-1383, at 3-6 (1934).

Congress heard limited testimony regarding securities exchanges in London, Paris, and Berlin,[5] but it authorized the Commission to regulate foreign securities exchanges only to prevent circumvention of the Exchange Act in issues of "*American* securities."[6]

The 73d Congress' limited authorization of extra-territorial regulation is consistent with its concern that regulation even of domestic-cubed securities frauds might exceed its legislative authority as understood at that time.[7] It is also consistent with the three neutrality acts that were passed beginning with the 74th Congress,[8] which "signaled profound American opposition to overseas involvement."[9]

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[5] *See, e.g., Stock Exchange Practices, Hearings before the S. Banking and Currency Comm.*, 73d Cong. 6440-45, 6450-57 (1934) (testimony of Dr. E.A. Goldenweiser and W. Thomas, both Div. of Research & Statistics, Fed. Reserve Bd., respectively).

[6] S. REP. NO. 73-792, *supra* n.4, at 23 (authorizing Commission to regulate certain "foreign exchanges transactions in *American securities*" "in order to prevent evasion") (emphasis added); *see* H.R. REP. NO. 73-1383, *supra* n.4, at 28 ("to prevent evasion of the act").

[7] *See, e.g.*, H.R. REP. NO. 73-1383, *supra* n.4, at 6; *Stock Exchange Regulation, Hearings before the H. Interstate and Foreign Commerce Comm.*, 73d Cong. 16 (1934) (testimony of J.M. Landis, Comm'r, FTC); *Stock Exchange Regulation, Hearings before the H. Interstate and Foreign Commerce Comm.*, 73d Cong. 890 (1934) (testimony of J.M. Landis, Comm'r, FTC); *id.* at 917-39 (legal briefs).

[8] S.J. Res. 173, 74th Cong., 49 Stat. 1081 (1935).

[9] U.S. Senate Historical Minute Essay, *September 4, 1934 "Merchants of Death"*, available at http://www.senate.gov/artandhistory/history/minute/merchants_of_death.htm, last accessed Feb. 23, 2010.

Because neither the Exchange Act nor its legislative history expresses a clear intention by Congress to apply Section 10(b) to foreign securities transactions between foreign investors and foreign issuers, that provision should not be construed to reach such transactions.

B. This Court's Practice of Construing Statutes to Avoid Unreasonable Interference with the Sovereignty of Foreign Nations

Closely related to the presumption against extraterritorial application is the practice that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted); *see Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same).

That practice is "based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Lauritzen*, 345 U.S. at 578 (citations omitted); *see Microsoft*, 550 U.S. at 455-56 ("courts should assume 'that legislators take account of the legitimate sovereign interests of other nations when they write American laws'" and that assumption "is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application") (citation omitted); *Hartford Fire Ins. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("[E]ven where the presumption against extraterritoriality does not apply, statutes should not

be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.").

To determine whether extraterritorial application of a statute would conflict with the law of nations, courts typically look to the limitations on a nation's "jurisdiction to prescribe" set forth in the *Restatement (Third) of Foreign Relations*. The *Restatement* provides that nations should refrain from exercising their jurisdiction "when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986). The relevant factors in making that determination include the citizenship or residence of the parties, the territory of the activity to be regulated, and the potential for conflict with foreign law. *Id.* §§ 403(2), 416(2).

Under the *Restatement*, it would be unreasonable for the U.S. to exercise jurisdiction over securities transactions that take place on foreign markets between foreign parties. Foreign nations have a primary interest in protecting their citizens and residents, punishing their wrongdoers, and regulating their exchanges. Application of U.S. law to foreign securities transactions would undermine those interests and conflict with the regulatory policies and legal systems of other nations.[10]

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[10] That conclusion accords with numerous lower court decisions. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (exercise of jurisdiction over securities fraud action by foreign investor against foreign defendant "would be unreasonable within the meaning of the Restatement of Foreign Relations" particularly because "the transaction is clearly subject to the regulatory jurisdiction of another country with a clear and

Construing the Exchange Act not to apply to foreign securities actions is supported by this Court's decision in *Empagran*. In that case, this Court applied principles of international comity to reject an application of the Sherman Act to claims by foreign plaintiffs for independent foreign injury suffered as a result of a world-wide price-fixing conspiracy. *See* 542 U.S. at 164. In so holding, the Court explained that U.S. courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws," thereby enabling "the potentially conflicting laws of different nations [to] work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65. In particular, federal courts "must assume" that "Congress . . . would not have tried to impose [American laws], in an act of legal imperialism, through legislative fiat" in cases where "foreign . . . conduct plays a significant role and where foreign injury is independent of domestic effects." *Id.* at 169 (emphasis added). This Court rested its decision on the mere "risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" – not proof of actual interference. *Id.* at 165.

The mere risk of interference with foreign securities regulation warrants care in applying the Exchange Act to any transaction on a foreign

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strong interest in redressing any wrong"); *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366, 369-70 (D. Del. 2006) (exercise of jurisdiction unreasonable under §§ 403 and 416 of the Restatement where shareholders "have no connection to the United States," "did not [purchase] their shares [in] an American market," and "[t]he outcome . . . will not affect American investors or markets").

securities exchange, as Congress recognized when making limited regulation discretionary with the Commission and specifying that it be used only to prevent the evasion of U.S. law. The substantial likelihood of actual interference by foreign-cubed actions transactions, as demonstrated in Section II, compels construction of the Exchange Act not to apply to disputes between foreign investors and foreign issuers on foreign exchanges.

C. Choice-of-Law Principles

Well-established choice-of-law principles also counsel against broad extraterritorial application of U.S. securities fraud laws. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 378, 379 (1934) [hereinafter RESTATEMENT (FIRST)]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 9, 145 (1971) [hereinafter RESTATEMENT (SECOND)]. Although the *Restatements* were adopted to govern choice of law among the several United States, their general principles apply to international disputes as well. *See* RESTATEMENT (SECOND) § 10 ("The rules in the Restatement of this Subject . . . are generally applicable to cases with elements in one or more foreign nations."); *see also Lauritzen*, 345 U.S. at 583 (applying the *Restatement (First)* in a case involving a choice between U.S. and foreign law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403, reporter's note 10 (incorporating the general choice-of-law factors of the *Restatement (Second) of Conflicts of Laws*).

According to the *Restatement (First)* – the leading authority on choice-of-law principles at the time of the Exchange Act's enactment – tort actions, including securities fraud actions, were governed by the law of the place of the wrong. RESTATEMENT (FIRST) §§ 378, 379. "The place of wrong is in the state

where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* § 377. The "'last event' necessary to make an actor liable for fraud is the injury, and consequently, for purposes of *lex loci delictis*, the place of the wrong is where that injury is sustained.'" *NCI Group, Inc. v. Cannon Services, Inc.*, No. 09-CV-0441, 2009 WL 2411145, at *11 (N.D. Ga. Aug. 4, 2009); *see* RESTATEMENT (FIRST) § 377, note 4, illustration 5 ("When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made."). Under the *First Restatement*, foreign, not U.S., law applies to claims by foreign investors seeking relief for harm suffered abroad.

The same result obtains under the *Restatement (Second)*, which provides that "[a] court may not apply the local law of its own state to determine a particular issue unless [that] would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved." RESTATEMENT (SECOND) § 9. Section 145 states that the governing law for tort actions should be that of the state which "has the most significant relationship to the occurrence and the parties." *Id.* § 145(1). The relevant factors for making that determination in a fraud or misrepresentation case include (a) the place where the plaintiff acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; and (d) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See id.* § 148(2).

The *Restatement (Second)* plainly weighs against the application of U.S. law to claims brought by foreign investors against foreign corporations for fraud committed in connection with the purchase or sale of foreign securities on foreign securities exchanges. Even if some conduct related to the securities fraud took part in the U.S., other countries – those in which the securities were bought or sold or the parties reside – have a more "significant relationship to the occurrence and the parties" in all such cases. RESTATEMENT (SECOND) § 145(1). Accordingly, under choice-of-law principles existing at the time Congress enacted the Exchange Act, and more modern principles applicable today, foreign, not U.S., law would – and should – govern securities fraud disputes among foreign parties on foreign exchanges.

D. *Forum Non Conveniens* Doctrine

Lastly, the longstanding U.S. and international doctrine of *forum non conveniens* militates against the exercise of jurisdiction over securities actions involving predominantly foreign interests. That doctrine instructs courts to defer jurisdiction where the gravamen of the suit is in another country and principles of fairness and convenience favor resolution of the action by a foreign court. Under that doctrine, courts choose an appropriate judicial forum to adjudicate a particular dispute by considering (1) the degree of deference to be accorded the plaintiff's choice of forum; (2) whether an adequate alternative forum exists; and (3) whether the balance of private and public interest factors favors adjudication in the alternative forum. *See Piper Aircraft Co. v.*

Reyno, 454 U.S. 235, 241 (1981); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09 (1947).[11]

Those factors firmly favor foreign resolution of foreign-cubed securities disputes. First, although the plaintiff's choice of forum is generally respected, that presumption is weaker when, as in foreign-cubed cases, the plaintiff is foreign. *Piper*, 454 U.S. at 241. Second, an alternate forum typically exists in a case involving a foreign issuer's sale of stock on a foreign securities exchange. Third, a balance of the relevant private and public factors favors deference to a foreign forum in foreign-cubed securities cases. *Cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435-36 (2007) (dismissal on *forum non coveniens* grounds was proper where "the gravamen of Malaysia International's complaint – misrepresentations to the Guangzhou Admiralty Court in the course of securing arrest of the vessel in China – is an issue best left for determination by the Chinese courts").[12]

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[11] The relevant interest factors include the countries in which evidence and witnesses are located, the unfairness of imposing jury duty on a community with no relation to the litigation, the "local interest in having localized controversies decided at home," and the interest in having a case decided by the court of the forum whose law governs the dispute. *See Gulf Oil*, 330 U.S. at 508-09.

[12] U.S. courts have frequently applied *forum non conveniens* principles to dismiss securities fraud actions involving foreign parties. *See, e.g., Alfadda v. Fenn*, 159 F.3d 41, 46-49 (2d Cir. 1998) (affirming dismissal of securities fraud action by Saudi Arabian investors); *Warlop v. Lernout*, 473 F. Supp. 2d 260, 262-65 (D. Mass. 2007) (dismissing action brought on behalf of investors who bought stock on European exchange); *In re Royal Group Techs. Sec. Litig.*, No. 04-CV-9809, 2005 WL 3105341, at *3 (S.D.N.Y. Nov. 21, 2005) ("while the United States has an interest in addressing allegations of fraud against corporations

In sum, *forum non conveniens* principles favor resolution of foreign-cubed securities actions by foreign courts applying foreign law. Although the *forum non conveniens* doctrine is typically applied on a discretionary, case-by-case basis, nothing in the doctrine precludes the drawing of a bright line with respect to a particular class of cases – like foreign-cubed securities actions – that always favor resolution by a foreign jurisdiction.

II. FOREIGN-CUBED SECURITIES ACTIONS AS A CLASS PRESENT INHERENT CONFLICTS WITH THE LAWS AND PUBLIC POLICIES OF FOREIGN NATIONS

As numerous commentators have recognized,[13] the broad application of U.S. securities law to cases involving foreign conduct and foreign parties threatens substantial – and unreasonable – interference with the sovereign interests, policies, and laws of other nations. That is particularly true with respect to claims by foreign plaintiffs against foreign defendants for fraudulent transactions on foreign securities exchanges. Principles of international comity therefore support a categorical rule against application of U.S. securities fraud law to foreign-cubed cases.

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listed on the NYSE, Canada has an interest in addressing allegations of fraud against its domestic corporations and its individual citizens"); *Yung v. Lee*, No. 00-CV-3965, 2002 WL 31008970, at *2 (S.D.N.Y. Sept. 5, 2002) ("While this Court agrees that the allegedly fraudulent SEC filing by ITNG has potential domestic impact, that impact is dwarfed by the vast majority of conduct in and impact upon China.").

[13] *See, e.g.*, Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law*, 46 COLUM. J. TRANSNAT'L L. 14,

A. Foreign Sovereigns Have a Paramount Interest in Foreign-Cubed Securities Transactions

Foreign nations have interests far superior to those of the U.S. in foreign-cubed securities fraud actions. By definition, such actions involve *foreign* plaintiffs suing a *foreign* company for losses suffered in connection with the purchase or sale of securities on a *foreign* exchange. Foreign nations have a substantial interest in regulating securities transactions that take place on their own exchanges and in protecting investors who trade on such exchanges. By contrast, the U.S. has little, if any, interest in regulating transactions that occur on foreign soil between foreign parties. In particular, the U.S. has little, if any, interest in protecting foreign securities markets,

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67 (2007) (foreign-cubed claims "generate excessive levels of conflict with other countries"); Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 957 (1994) ("applying the U.S. securities laws to transactions having only a tangential relationship to the U.S. risks offending other nations by perpetuating an already problematic image of American pomposity"); Stevan Sandberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315, 326 (1976) (citing the "dangers of United States intrusion into a foreign nation's regulation of its securities markets and American interference with a sovereign state's management of its economy"); Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws*, 9 FORDHAM J. CORP. & FIN. L. 89, 117-18 (2003); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 208 (1996); Jill E. Fisch, *Imprudent Power*, 87 NW. U. L. REV. 523, 524 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own").

compensating foreign investors, or punishing foreign corporations.

That is true even in cases in which conduct occurred in the U.S. in relation to the securities fraud at issue. The elements of a section 10(b) claim are: (1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in cases involving public securities markets as transaction causation; (5) economic loss; and (6) loss causation, *i.e.*, a causal connection between the material misrepresentation and the loss. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). In foreign-cubed cases, all of those elements take place abroad. Even if a *related* fraud occurred in the U.S., the *securities* fraud takes place abroad where investors are in fact defrauded. Any related U.S. fraud is not itself securities fraud that can or should be subject to private relief under the U.S. securities fraud laws.[14]

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[14] Petitioners' argument that a rule against U.S. jurisdiction in foreign-cubed cases would make the U.S. a "haven for fraud" is without merit. *E.g.*, Pet Br. at 21. In foreign-cubed securities frauds, the foreign country on whose exchange the securities fraud took place will necessarily govern the securities fraud at issue and can provide a remedy for such fraud in accordance with its own laws and policies. To the extent related fraudulent conduct occurred in the U.S., that separate fraud can be addressed by U.S. criminal and public enforcement authorities against the specific U.S. perpetrators. It is highly implausible that refusing to apply Section 10(b) in foreign-cubed cases would create an incentive for corporations to commit fraud in the U.S., especially with respect to securities sold on foreign exchanges. In any event, that highly theoretical possibility is far outweighed by the real world, practical comity concerns that would be implicated by an attempt by the U.S. to impose global application of its securities laws.

B. Application of U.S. Securities Fraud Laws to Foreign-Cubed Cases Would Conflict With the Regulatory Policies of Foreign Countries

Not only do foreign nations have a paramount interest in foreign-cubed securities cases, but application of U.S. securities laws to such cases would "create[] a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. To be sure, most foreign countries proscribe securities fraud. But foreign nations have made very different choices with respect to the best way to implement that proscription. In particular, the U.S. approach to policing securities fraud – by privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis – is not one that has commended itself to most foreign nations. *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy*, 10 TUL. J. INT'L & COMP. L. 5, 9 n.18 (2002) (European nations generally prefer "state actions, not private ones" for the enforcement of law); Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 32 ("[m]ost foreign legal systems do not permit group litigation"); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 484 (2009) ("only a few other countries have adopted class-action mechanisms for securities violations").

The policy decision by foreign countries not to follow the American model is not surprising in light of the numerous and well-documented problems caused by private class actions. While the U.S. attempted to address some of those concerns in the 1995 PSLRA and other reforms, the Senate report on

the PSLRA clearly states the substantial downsides of civil class actions in securities cases. *See* S. REP. NO. 104-98, 1995 U.S.C.C.A.N. 679, 687-88 (describing the myriad ways plaintiffs can abuse the U.S. securities laws); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law").

Indeed, it is widely recognized that even meritorious "[s]ecurities class actions impose enormous penalties, but they achieve little compensation and only limited deterrence." John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 COLUM. L. REV. 1534, 1534 (2006) ("This is because of a basic circularity underlying the securities class action: When damages are imposed on the corporation, they essentially fall on diversified shareholders, thereby producing mainly pocket-shifting wealth transfers among shareholders. The current equilibrium benefits corporate insiders, insurers, and plaintiffs' attorneys, but not investors."); *see* Comment, *Securities Litigation As a Coordination Problem*, 11 U. PA. J. BUS. L. 475, 513 (2009) ("Securities litigation merely redistributes wealth among innocent shareholders and fails to penalize the most culpable parties. Shareholders lose value as a whole because litigation reduces the prices of their shares and transfers a large amount of their wealth to lawyers.").

Accordingly, just as foreign nations argued in *Empagran* that "to apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own

domestic antitrust laws embody" (542 U.S. at 167), the same is true for U.S. securities actions. Where foreign plaintiffs seek redress for foreign harm suffered abroad, why "should American law supplant, for example, Canada's or Great Britain's or Japan's [or France's] own determination about how best to protect Canadian or British or Japanese [or French] customers from [securities fraud] engaged in significant part by Canadian or British or Japanese [or France] or other foreign companies?" *Id.* at 165; *cf. Microsoft*, 550 U.S. at 439 (refusing to apply patent law provision to foreign conduct because, among other reasons, foreign law "may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions") (citation omitted). The U.S. has no valid interest in undermining the policy judgments of foreign nations by applying its chosen method of remedying securities fraud to foreign securities transactions.[15]

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[15] Allowing U.S. foreign-cubed securities actions would be especially unfair to foreign companies, which would potentially be exposed to greater or different regulation than their governments have decided is fair or necessary. Especially troubling is the potential for U.S. courts in foreign-cubed actions to hand down large damages awards that greatly exceed what would be available under foreign law, and that may substantially affect the financial condition of the foreign company – to the potential detriment of the company, the long-term interests of its shareholders, and the nation in which it is organized and operates – and to the substantial benefit of self-appointed lawyers in another country. *See* John C. Coffee, Jr., *Global Class Actions*, NAT'L L. J., June 11, 2007, at 12 (observing that allowing U.S. securities class actions to be brought by foreign plaintiffs against foreign corporations "disruptively expos[es] foreign corporations to a litigation environment in which plaintiffs arguably have undue leverage" and that "the United States' foreign neighbors

C. Application of U.S. Securities Fraud Laws to Foreign-Cubed Cases Would Conflict with the Specific Legal Rules of Foreign Countries

In addition to conflicting with fundamental regulatory choices of foreign nations, allowing U.S. foreign-cubed securities actions would pose a substantial conflict with specific substantive and procedural rules of foreign countries. Even when foreign countries permit private rights of action for securities fraud, they often have different schemes of disclosure, different pleading and substantive standards for scienter, different standards of reliance,[16] materiality and causation, different rules governing contribution and indemnity, and different limitations periods. In addition, foreign countries may approve of different measures of damages. For example, many foreign nations do not permit the award of punitive damages. *See* Edward F. Sherman, *Group Litigation Under Foreign Legal Systems*, 52 DEPAUL L. REV. 401, 419 (2002).[17]

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must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities").

[16] *See, e.g.*, Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 61 (noting that "the United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance on misleading information").

[17] Although punitive damages are not available under Section 10(b), such damages are often "recoverable in a pendent state [law] claim." *Cyrak v. Lemon*, 919 F.2d 320, 326 (5th Cir. 1990). It is possible that French courts in particular would refuse to enforce U.S. class action judgments that award punitive damages on the ground that such judgments violate the

Foreign jurisdictions also generally have different rules governing attorney's fees, contingency fees, jury trials, and pre-trial discovery.[18] Although those rules are often characterized as "procedural," they have substantial practical effect and application of U.S. rules to foreign securities transactions could upset a foreign nation's carefully thought out balancing of plaintiffs' and defendants' interests.

One particular rule that conflicts with the public policy of many nations is the opt-out procedure of U.S. class actions. "Opt out" class actions permit plaintiffs' attorneys to sue on behalf of large numbers of individuals based on a theory of constructive notice. An individual can become a member of an "opt out" class without ever having made an informed

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French constitutional principle of proportionality of damages. *See, e.g.*, Court of Appeal of Poitiers, No. 0702404 (Feb. 26, 2009) ("a foreign decision which . . . awards punitive damages far in excess from the price of the vessel, object of the contract . . . infringes upon the principle of proportionality between the damages and the breach guaranteed by Article 8 of the French Declaration of the Rights of Man and the Citizen."); J. Ortscheidt, "Les dommages et intérêts punitifs en droit de l'arbitrage international," *Petites Affiches*, No. 232/2002, at 17 (Nov. 20, 2002); Conseil Constitutionnel, Decision No. 88-248 DC, at §§ 35 & 36 (Jan. 17, 1989).

[18] *See, e.g.*, Stefano M. Grace, *Strengthening Investor Confidence in Europe*, 15 J. TRANSNAT'L L. & POL'Y 281, 289 (2005) ("The 'English rule' is the predominant rule in Europe, and only one EU member state, Luxembourg, has rejected the rule requiring each party to pay their own litigation costs similar to the American approach."); Sherman, 52 DEPAUL L. REV. at 421 ("EU countries follow the 'loser pays' rule requiring the losing side to pay the other side's attorney's fees, in contrast to the 'American rule' by which the parties pay their own attorney's fees."); *id.* (contingency fees are generally not allowed in EU countries).

decision to do so. Indeed, the reality is that many, if not most, members of a typical "opt out" class will never learn of the existence of the lawsuit until it is over, if then. The U.S., of course, has a sovereign right to apply the opt-out mechanism to cases involving its own citizens. Most other nations, however, do not permit the "opt out" method of binding individuals to the outcome of litigation. *See* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 61 (even foreign legal systems "that have adopted some form of collective action mechanism do not recognize the validity of opt-out procedures").[19] There is accordingly a significant risk that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment, creating the further risk that a defendant would face further litigation in a country in which transactions in its securities had taken place. *See id.*; *see also Alstom*, 253 F.R.D. at 281-82 (foreign shareholders should not be included in U.S. securities fraud class actions against foreign companies if there is a likelihood that foreign courts would refuse to recognize and give preclusive effect to a judgment of the U.S. court). That risk is analyzed as a matter of French law in the next section.

In sum, foreign countries – including France – have struck their own balance in regulating securities fraud in accordance with their own legal cultures, traditions, and public policy objectives. To allow

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[19] *See also* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 63 ("opt-out mechanism is seen as contrary to public policy in most countries"); Choi & Silberman, 2009 WIS. L. REV. at 484 ("only a few other countries have adopted class-action mechanisms for securities violations"); Sherman, 52 DEPAUL L. REV. at 418-32 (many foreign countries believe the opt-out procedure is inconsistent with due process).

foreign investors to pursue U.S. securities fraud class actions would upset that delicate balance and offend the sovereign interests of foreign nations in cases where the U.S. has no good reason to do so.

D. Example: the Fundamental Due Process Concerns Posed by Opt-Out Class Actions According to French Law

The *Cour de cassation* (the highest court in the French judiciary) recently held that a French judge should recognize and enforce a foreign judgment only if three conditions are met: (1) there is a sufficient link between the dispute and the chosen forum; (2) the decision does not violate French public policy; and (3) the party seeking enforcement did not evade French law in obtaining the foreign judgment. *Cornelissen v. Société Avianca Inc., et autres*, Appeal No. 05-14.082, *Cour de cassation*, First Civil Chamber (Feb. 20, 2007).

French courts would almost certainly refuse to enforce a court judgment in a U.S. "opt out" class action because it violates the second prong of that test – specifically, the "opt out" mechanism violates French constitutional principles and public policy.[20]

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[20] Even apart from the opt-out problem, French courts might well decline to enforce a judgment in a foreign-cubed lawsuit. Foreign-cubed lawsuits by their nature involve, at best, an attenuated link between the dispute and the U.S. and thus plaintiffs would have an uphill battle in satisfying the first prong of the test for enforcing foreign judgments. Moreover, plaintiffs would have difficulty satisfying the third prong because a French court faced with a French citizen seeking to enforce a U.S. judgment against a French company based on losses incurred on securities sold on a French exchange could easily conclude that such a judgment was the product of an evasion of French securities regulations.

The *Conseil Constitutionnel* (the sole French high Court authorized to declare the constitutionality of French legislation) has held that any "individual associated with a collective action must be offered the opportunity to give an informed consent and remain at liberty to personally conduct the defense of his interests and to terminate the action." Decision No. 89-257 DC (July 25, 1989).[21] That decision reflects the French constitutional principle that the choice to initiate and terminate a legal action is an important individual right. AJDA, L'Actualité juridique - Droit administratif, at 796 (Dec. 20, 1989). French legal scholars and official commentators agree that the Conseil Constitutionnel's reasoning precludes the "opt out" method of binding class members. *See, e.g.*, *Les cahiers du Conseil Constitutionnel*, No. 23/2007, at 22 ("In case of a failure to respect this individualized consent, which does not, for example, exist in the Anglo-Saxon opt-out mechanism in class actions, the individual would, in violation of the Constitution, be improperly deprived of a right."); S. Guinchard, "Une class action à la française?" *Recueil Dalloz*, at 2180 (32/2005) (noting that the Conseil Constitutionnel's decision requires "pro[of] at the outset of the proceedings that the [party] has had actual notice (personal knowledge) of the action" and concluding that it "amounts to a rejection of the opt-out mechanism").

The conclusion that the "opt out" mechanism is inconsistent with French constitutional law and public policy was reaffirmed in a May 2006 interview

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[21] Quotations from French authorities provided herein were translated to English by counsel. Counsel is prepared to lodge the original French versions and English translations with the Clerk of the Court upon request.

by Guy Canivet, the chief justice of France's highest civil court at the time. In that interview, Justice Canivet explained that "[t]he exclusion option ('opt out') is too far removed from [France's] own legal reflexes, and even dangerous" in that "[i]t seems . . . very difficult to hold someone bound to a legal decision in which he did not willingly participate." *La Tribune*, at 30 (May 16, 2006); *see also* J. Lemontey & N. Michon, "Les 'class actions' américaines et leur éventuelle reconnaissance en France," *JDI* 2/2009 at 535 (noting that "US class actions entail a loss of control on the dispute for the members of the class which is incompatible with fundamental principles of French law").[22]

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[22] "Opt out" class actions may also be found to violate French public policy on the ground that they are incompatible with French due process requirements. Due process under French law and Article 6 of the European Court of Human Rights requires, among other things, that both parties be offered similar procedural rights. *See, e.g., Ankerl v. Switzerland* (Oct. 23, 1996); *Feldbrugge v. The Netherlands*, at 15 (May 29, 1986). The "opt out" mechanism, however, results in the defendant being forced to litigate against absent and unidentified members of a class. This type of uneven battle is inconsistent with French due process standards and a judgment entered under such circumstances would likely be found by a French court to violate public policy. *See* S. Guinchard, "Une class action à la française?" *Recueil Dalloz*, at 2180 (32/2005) ("Could the defendant not argue that, in the opt-out system, he does not know all of its opponents while on the other hand, the class representative knows its adversary? The breach of equality between the parties is inherent to the opt-out mechanism"); M-A Frison-Roche, "Les résistances mécaniques du système juridique français à accueillir la class action: obstacles et compatibilités," *Les Petites Affiches*, No. 115/2005, at 22 (June 10, 2005) ("the breach of equality [in an opt-out class action] infringes upon due process rights").

Relying on the above authorities, a U.S. court correctly found that "[a] French court would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent to this Court's jurisdiction over their claims and the United States' class action procedure would deny them an adequate opportunity to participate in the litigation." *Alstom*, 253 F.R.D. at 286. The court properly noted that recent legal developments "demonstrate that French authorities have repeatedly rejected the adoption of an opt-out class action system in France because that type of system violates French constitutional principles and public policy." *Id.* at 287. "French authorities' rejection of opt-out class action mechanisms thus provide further evidence suggesting that a French court would likely not recognize a judgment of [a U.S.] Court if the class included absent French investors." *Id.*

That courts in France (and probably other nations) will likely refuse to enforce judgments in opt-out foreign-cubed cases counsels strongly against opening the door to such lawsuits, especially given the absence of any clear congressional command to do so.

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Extraterritorial application of U.S. securities laws in foreign-cubed cases would pose just the sort of unreasonable interference with sovereign interests that this Court found precluded extraterritorial application of the antitrust laws in *Empagran*. If such lawsuits were permitted, U.S. courts would become a magnet for foreign plaintiffs who believe they can obtain a better result in the U.S. than they

can under their nation's laws.[23] French regulatory authorities and courts would have greater difficulties reaching resolutions of such disputes if a complainant believed it had the option of bypassing the French regulatory system altogether by filing a lawsuit in the U.S. That sort of international forum shopping would undermine the laws of other nations while imposing an unnecessary burden on U.S. courts.[24]

III. FOREIGN-CUBED SECURITIES ACTIONS SHOULD BE CATEGORICALLY PRECLUDED

International comity principles support a categorical rule barring foreign-cubed securities class actions from U.S. courts at the outset of litigation. As Judge Bork explained for the D.C. Circuit in *Zoelsch*, a case-by-case application of international comity principles would be "difficult to apply," "inherently unpredictable," provide "powerful incentives" to "litigat[e] . . . the jurisdictional issue itself," divert "limited American judicial resources" to foreign disputes, and – most importantly – be unfaithful

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[23] Indeed, in the hope of prosecuting global class actions, U.S. law firms have attempted to recruit foreign investors in recent years by, among other things, opening offices in Europe. *See* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 71 n.198 & n.199 (noting that in 2007, Cohen Milstein, Hausfeld & Toll, P.L.L.C., a leading plaintiff's firm, opened its own branch in London, and that "[p]rominent U.S. plaintiffs' firms, including Lerach Coughlin Stoia Geller Rudman & Robbins LLP, promote their representation of foreign institutional investors and their affiliations with foreign offices on their websites").

[24] Although different nations' securities laws may interact, the exact nature of those interactions should be the product of careful negotiations between governments and not dictated by the self-interested acts of private parties.

to international comity principles and "tend to deemphasize foreign sovereign interests." 824 F.2d at 32 n.2. A case-by-case analysis that is not applied at the threshold (which appears to be Petitioners' position) would require foreign companies to bear the immense burden, expense, and uncertainty of U.S. discovery, dispositive motions, and perhaps trial before a court rules on the extraterritoriality issue – and the concomitant pressure to settle that accompanies such uncertainty.

The inherent unpredictability of a case-by-case approach and its tendency to disserve international comity principles is illustrated by the court of appeals' unsuccessful attempt to reconcile its prior decisions in the opinion below. In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975), the "heart" of the fraud that "directly caused loss to investors," according to the court below, was "*placing* the allegedly false and misleading prospectus 'in the purchasers' hands.'" Pet. App. 13a (quoting *Bersch*, 519 F.2d at 987) (emphasis added). (In *Bersch*, the court found no subject-matter jurisdiction because the placement occurred outside the U.S. Pet. App. 12a-13a.) By contrast, in *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003), the act that directly caused the investors' loss was *creating* the fraudulent statements. *See* Pet. App. 14a. (In that case, the court found subject-matter jurisdiction because the statements were created in New York, even though they were placed in investors hands outside the U.S. *Id.*) The two decisions are flatly inconsistent, illustrate the inherent unpredictability of a case-by-case approach, and underscore the need for a categorical rule that may be applied at the outset of litigation to protect international comity.

A categorical rule could be based on subject-matter jurisdiction – *i.e.*, Section 10(b) of the Exchange Act does not confer subject-matter jurisdiction over foreign-cubed securities actions. The courts of appeals considering the extraterritorial application of U.S. securities laws have consistently analyzed the issue as one of subject-matter jurisdiction. *See, e.g.*, Pet. App. 22a; *Berger*, 322 F.3d at 192; *Continental Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *Bersch*, 519 F.2d at 984. Although this Court's recent decisions suggest that statutory limitations not characterized by Congress as jurisdictional should not be construed as jurisdictional (*see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511, 516 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)), the jurisdictional nature had been established for two decades before Congress "ratified the implied right of action" in 1995 in the PSLRA and "accepted the §10(b) private cause of action as then defined." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165-66 (2008).

Alternately, a categorical rule could be based on foreign-cubed plaintiffs' failure to state a claim upon which relief can be granted – *i.e.*, Section 10(b) of the Exchange Act simply does not apply to foreign-cubed securities actions as a matter of international comity. That statutory construction is identical in principle to this Court's "across the board" determination in *Empagran* that the Sherman Act does not apply to antitrust actions claiming independent foreign injury. 542 U.S. at 168. In both cases, the Court is declining to "take . . . account of comity considerations case by case" because that "approach is too complex to prove workable" and would impose "procedural costs and delays [that] could themselves

threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust [or here, securities] enforcement system." *Id.* at 168-69. The respondents in this case "moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." Pet. App. 5a. Under this alternate, merits-based approach, the judgment below could be affirmed for failure to state a claim rather than dismissed for lack of jurisdiction.[25]

Either approach, however, would prevent foreign-cubed securities actions from proceeding past the pleadings; would avoid the extraterritorial application of the anti-fraud provisions of the U.S. securities laws to actions involving solely foreign parties and foreign exchanges, and would protect the ability of foreign sovereigns to regulate their citizens, residents, and exchanges according to their own legal traditions, cultural values, and public policies.

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[25] The Court could reach a similar result by holding that all foreign-cubed securities fraud actions should be dismissed under the doctrine of *forum non conveniens*. *See supra* pp. 17-19.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CIOTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of *Amici Curiae* the Securities Industry and Financial Markets Association, the Association for Financial Markets in Europe, the Chamber of Commerce of the United States of America, the United States Council for International Business, the Association Française des Entreprises Privées, and GC100 In Support of Respondents

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INTEREST OF *AMICI CURIAE*[1]

Amici are comprised of an extremely diverse group of preeminent business and financial organizations, both in the United States and abroad, and they hold a unique viewpoint unrepresented by either party.

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. As a leading advocate in financial markets, SIFMA brings a perspective that is not represented by the parties.

The Association for Financial Markets in Europe ("AFME") represents a broad array of European and global participants in the wholesale financial markets. Its 190 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. AFME aims to promote safe,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

sound, and efficient wholesale financial markets; engage constructively with stakeholders and policymakers toward ensuring open European and global markets that benefit from well-crafted, globally consistent regulations; foster the adoption of market-led solutions, standards, and practices; and provide authoritative industry expertise and views for public officials, private individuals, and the media. As a representative of international financial market participants, AFME has a stake in this case's potential effect on foreign and global markets.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents an underlying membership of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States and a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to the nation's business community.

A driving force for American business, the United States Council for International Business ("USCIB") works to promote an open system of world trade, finance, and investment in which

business can flourish and contribute to economic growth, human welfare, and protection of the environment. Its membership includes some 300 U.S. companies, professional services firms, and associations. For USCIB, an organization with a primary goal of promoting U.S. competitiveness, this case addresses issues of fundamental importance.

Association Française des Entreprises Privées ("AFEP") is an organization that represents 90 of the largest French companies, including several with shares listed on the New York Stock Exchange and many more with unlisted American Depository Receipt trading facilities in the United States. AFEP plays a leading role in commenting on French, European, and international legal, regulatory, and financial developments, from the perspective of its member companies. The French listed companies that belong to AFEP had a market capitalization of approximately 760 billion euros as of December 31, 2008, and aggregate sales of more than 1.4 trillion euros in 2008. They employ more than 5.4 million people. As an organization of publicly traded French companies, AFEP has a distinct interest in the implications of this case.

GC100 is the Association of General Counsel and Company Secretaries of the FTSE 100, the 100 largest U.K.-listed companies. There are currently some 120 members of the group representing some 90 companies. As an organization representing publicly traded U.K. companies, the GC100 has a strong interest in this case, in particular because of

the uncertainties and costs associated with U.S. securities class actions, which have diminished the attractiveness of U.S. markets to U.K. issuers.

SUMMARY OF ARGUMENT

The rapid globalization of financial markets—volatile and turbulent in recent years—poses significant competitive challenges for the United States. These are challenges recognized not only by *Amici* and their members as market participants, but also by respected scholars in law, economics, and finance, and by leaders at all levels of government and across the political spectrum. Expanding Section 10(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78j(b), to permit so-called foreign-cubed securities class actions—litigation with abusive potential long acknowledged by the courts and Congress—would further undermine the United States' competitive stance, rendering it a less attractive venue for foreign investment and capital raising, and impeding global regulatory efforts in the wake of the financial crisis.

A foreign jurisdiction need look no further than the facts of this case to demonstrate, for its competitive advantage, the perils of doing business in the United States. An Australian company, with virtually all of its shareholders outside the United States, faces the possibility of protracted litigation in U.S. courts for alleged misstatements made to its non-U.S. investors in connection with securities

transactions effected in the Australian market. Perhaps even more damaging, Petitioners principally rest this unprecedented attempt to expand Section 10(b)'s private right of action to this foreign-cubed securities action, rightly rejected by the district court and the Court of Appeals, on the Australian company's decision to invest in a U.S. subsidiary. In other words, Petitioners seek to convert the decision to acquire a U.S. business into a securities litigation risk factor for foreign companies.

The uncertainties and costs associated with securities class actions have been widely recognized as key factors diminishing the attractiveness of U.S. markets. Initial public offerings have gravitated to other jurisdictions in far greater proportions in recent years. Numerous foreign issuers, whose securities previously traded here, have chosen to exit U.S. markets, with well over forty percent of all companies from France, the United Kingdom, Germany, Italy, and Australia having deregistered their securities from the United States since 2007. Allowing a foreign-cubed securities class action to proceed in U.S. courts can only strengthen the disincentives against investment in the United States, just as it would also dangerously subvert the competing policy choices of foreign jurisdictions—at a time when global turmoil in the financial markets has made international regulatory coordination more important than ever.

Moreover, Petitioners' effort to expand Section 10(b) to foreign-cubed class actions is not grounded in any congressional mandate or precedent of this

Court. On the contrary, the plain language of the Act and principles of comity and judicial restraint unequivocally favor resolution of these actions not in the United States, but in the courts of other countries. Recent precedent makes clear that this Court will begin with the "presumption that United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). Nothing in the Act rebuts that presumption. Rather, the statute expressly provides that U.S. securities laws should not be applied to transactions on foreign exchanges or in foreign markets except in limited circumstances inapplicable in the context of foreign-cubed securities cases.

Further, there can be no question that this case involves issues for which other countries can, and do, make fundamentally and purposefully different policy decisions when adopting their own regulatory regimes. Some nations offer additional investor protections not present in the United States, while others have declined to adopt the U.S. private securities class action model, with its combination of the "fraud on the market" theory, opt-out class action procedure, tolerance of contingency fees, lack of a "loser pays" rule, expansive discovery procedures, and jury trials.

The Court has recently reaffirmed the need, in light of the potential for misuse and abuse of private securities class actions, to construe narrowly the implied right of action under Section 10(b). *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,*

Inc., 552 U.S. 148, 164-66 (2008). This Court cautioned that, "if not adequately contained, [private securities class actions] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and to "allow plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge*, 552 U.S. at 163.

For these reasons, *Amici* urge the Court to adopt a bright-line rule that Section 10(b)'s implied private right of action does not extend to claims against foreign issuers arising out of securities transactions executed on foreign exchanges or in foreign markets. A clear and unambiguous rule will avoid the ever-variant, *ad hoc* analysis currently employed under the "conduct" and "effects" tests, which undermines the fairness and predictability that is essential to encourage foreign investment in the United States and preserve the preeminence of its capital markets. Moreover, the proposed rule squares fully with the Court's long-standing presumption against extraterritoriality and its directive against expanding implied private rights of action.

ARGUMENT

I. EXTENDING SECTION 10(b)'S PRIVATE RIGHT OF ACTION TO A FOREIGN-CUBED SECURITIES CLASS ACTION WOULD DETER FOREIGN INVESTMENT AND UNDERMINE INTERNATIONAL COORDINATION OF GLOBAL MARKETS REGULATION

The dramatically increased globalization and interdependence of financial markets has greatly heightened the need to impose appropriate limits on the extraterritorial application of domestic securities laws. Application of domestic law where a private securities claim has only a remote connection to the United States threatens to undermine the attractiveness of the United States for foreign investment, and the competitiveness and effective operation of U.S. markets. This is especially true in cases such as this one, where the investors, the issuer, and the securities transactions all were located outside the United States, and where compelling precedent supports the dismissal of the claim.

Concerns about the attractiveness of foreign investment in the United States and the competitiveness of U.S. capital markets are exacerbated by the unpredictability of the "conduct" and "effects" tests as applied by the various Courts of Appeals. The absence of a clear standard leaves open the risk for non-U.S. entities that engaging in investment activity in the United States—be it direct investment, such as acquiring a

U.S. subsidiary, or raising capital in U.S. markets—will give rise to liability for claims under an expansive Section 10(b) implied right of action as applied to securities issued abroad under other regulatory regimes. American businesses and citizens, and the U.S. economy as a whole, are harmed to the extent foreign firms decline to do either. At the same time, extending the reach of Section 10(b)'s implied private right to foreign transactions made between foreign parties directly conflicts with foreign nations' own investor protection regimes and the U.S. policy objective of promoting an internationally coordinated approach to the oversight of increasingly interdependent global markets. Because the private right of action under Section 10(b) is a purely judicial construct, the Court may properly rely upon these serious market harms and comity considerations as bases for limiting its application. *See Stoneridge*, 552 U.S. at 163-64; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

A. Expanding the Implied Right of Action Under Section 10(b) to Foreign-Cubed Securities Class Actions Would Deter Foreign Investment in the United States and Decrease the Competitiveness of U.S. Capital Markets

Globalization of world markets has given rise to new challenges for the United States, including increased competition to its standing as a preeminent center for foreign investment and to the prominence of its capital markets. At the same time, U.S. private class actions alleging transnational securities fraud are on the rise. *See, e.g.*, *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2009 WL 3241404 (S.D.N.Y. Oct. 5, 2009); *In re Optimal Strategic U.S. Equity Fund Sec. Litig.*, 648 F. Supp. 2d 1388 (J.P.M.L. 2009); *see also* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 40-41 n.120 (2007) (number of foreign-cubed class actions increased from two in each of 1996 and 1997, to nine in 2004, and eight in 2005).[2]

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[2] Narrowly focusing only on the last three years, *see* Petitioners' Br. at 26 n.12, Petitioners ignore that private securities class actions against foreign issuers have increased dramatically as a percentage of total securities class actions, rising from around 6% and 3% in 1996 and 1997, to 12% in 2009. *See* Cornerstone Research, *Securities Class Action Filings—2009: A Year In Review* 11 (2010), *available at* http://securities.cornerstone.com/pdfs/Cornerstone_Research_Filings_2009_YIR.pdf.

These two developments are not unrelated. The increased cost of investing in U.S.-based businesses or accessing its capital markets occasioned by use of U.S. courts to pursue private transnational securities claims poses a substantial threat to U.S. interests, at a time when foreign investment in the United States and the attractiveness of U.S. capital markets are already challenged. Indeed, one need look no further than the facts of the instant case to see that expanding Section 10(b)'s private right to foreign-cubed securities class actions could significantly discourage cross-border economic activity into the United States: an Australian company—virtually all of whose securities trade on a foreign exchange and virtually all of whose shareholders are non-U.S. persons—acquired a U.S. subsidiary, and that investment allowed it to be hauled into a U.S. court as a defendant in securities class action litigation brought by foreign plaintiffs. As this Court previously recognized, the possibility of such litigation may well deter foreign firms from conducting business in the United States. *See Stoneridge*, 552 U.S. at 163-64.[3]

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[3] *See also* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 2-5 (Oct. 2008), *available at* http://investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf ("U.S. Litigation and FDI") (noting that "concerns with excessive litigation and navigating what is seen as an expensive U.S. legal system" could "affect the decision by foreign investors to invest in the United States"); Henry M. Paulson, Secretary, U.S. Dep't of Treasury,

The cost of deterring foreign investment in the United States is all the more salient in the wake of the recent global economic crisis.[4] Cross-border capital flows have significantly diminished as investors, companies, banks, and other financial institutions have increasingly turned inward, directing their resources to domestic markets. *See* McKinsey Global Institute, *Global Capital Markets: Entering a New Era*, at 8-9, 13-15 (Sept. 2009), *available at* http://www.mckinsey.com/mgi/reports/pdfs/gcm_sixth_annual_report/gcm_sixth_annual_report_full_report.pdf (describing decline in global financial assets and foreign direct investment). Additionally, the past few years have witnessed a retraction in the United States' share of overall global investment and a lag in the growth rate of such investment as compared to other nations. *See* Rick L. Weddle, *Supplemental Report to Testimony before the Subcommittee on Economic Policy—Funding for Invest in America to Attract Investment, Create Jobs and Stimulate Growth*

Remarks at Forum on International Investment (May 10, 2007), *available at* http://www.treasury.gov/press/releases/hp398.htm ("Paulson's Remarks") ("[W]e must assess the cost versus the benefits of our regulatory structure and certain aspects of our legal system that may discourage foreign investment.").

[4] Foreign investment is essential to the health of the U.S. economy. *See* U.S. Litigation and FDI, at 2 ("[Foreign direct investment] plays a major role as a key driver of the U.S. economy and as an important source of innovation, exports, and jobs."); Paulson's Remarks ("[A]ffiliates of foreign companies bring investments to our shores, creating jobs and revitalizing communities.").

Industries, at 2-3 (submitted Dec. 18, 2009); *see also* U.S. Litigation and FDI, at 2. Projections that mature markets such as the United States will fare worse than emerging markets in rebounding from the current crisis, *see, e.g.*, McKinsey Global Institute, at 8, heighten the importance of this policy consideration in analyzing a proposed expansion of the implied private right.

Separately, permitting private foreign-cubed securities claims to proceed under Section 10(b) poses a distinct threat by discouraging foreign issuers from raising capital in the U.S. market.[5] Government officials, industry leaders, and academics alike agree that one important factor that deters foreign companies from listing on U.S. exchanges is the "fear of U.S. private antifraud litigation." *See* John C. Coffee, *Corporate Securities*, N.Y.L.J. (Sept. 18, 2008); *accord* Committee on Capital Markets Regulation, *Committee on Capital Markets Regulation Completes Survey Regarding the Use By Foreign Issuers of the Private Rule 144A Equity Market*, at 3 (Feb. 2009), *available at* http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf.[6] Likewise, potential exposure

[5] There can be no doubt that the strength of U.S. capital markets is integral to the strength of the U.S. economy as a whole. *See* WSJ Staff, *Geithner Remarks on Financial Stability Plan*, Wall St. J., Feb. 10, 2009, http://blogs.wsj.com/economics/2009/02/10/geithner-remarks-on-financial-stability-plan/tab/article/.

[6] *Accord* Michael Bloomberg & Charles Schumer, *Sustaining New York's and US' Global Financial Services Leadership* (Jan. 22, 2007), *available at* http://www.fr.com/

to U.S. securities litigation threatens to deter foreign firms from raising capital in the U.S. private unlisted market. *See, e.g.*, Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/Corp. 1243, 1254 (2009).

The risks of listing on a U.S. exchange for foreign issuers are highlighted by *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122-23 (2d Cir. 1995). There, the Court of Appeals found that a foreign-issuer's filing of a Form 20-F in the United States for its American Depository Receipts ("ADRs") traded on a U.S. exchange was sufficient under the "conduct" test to permit foreign investors (who had not bought ADRs or read the Form 20-F) to pursue a Section 10(b) claim based on purchases of the company's ordinary shares on a foreign exchange.[7] If an issuance of ADRs—typically a small fraction of a company's total equity—subjects a foreign issuer to a U.S. securities class action relating to trading of its foreign-issued securities by foreign investors in a foreign market (or even raises the

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practice/McKinsey.pdf; Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_Report REV2.pdf.

[7] *See also, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 362 (D. Md. 2004) (citing *Itoba* and relying in part on foreign company's Securities and Exchange Commission (the "Commission") filings to permit Section 10(b) claims of non-U.S. investors who purchased company's stock on foreign exchanges).

specter of such risk), foreign issuers will be discouraged from listing in the United States in the first place. *See* Coffee, *supra* (noting in such instances "the issuer may face a multi-billion dollar class action that can threaten its solvency").

The issue is not a theoretical one. Many foreign companies have left the U.S. market since the Commission amended its rules in June 2007 to remove barriers to deregistration: 15 out of 27 French companies registered in the United States at the end of 2006 had deregistered by the end of 2008, as had 19 of 44 U.K. companies, 7 of 20 German companies, 6 of 11 Italian companies, and 15 of 24 Australian companies. *See* Securities and Exchange Commission, *International Registered and Reporting Companies* (June 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/internatl/companies.shtml.

In the face of these materialized risks, Petitioners raise the generalized charge that prohibiting foreign-cubed securities claims will allow the United States to become a "'Barbary Coast' safe harbor for fraud that occurred here but led to injury abroad." *See* Petitioners' Br. at 21. Petitioners, however, ignore that a decision to construe narrowly the private right of action under Section 10(b) does not affect the Commission's ability to bring enforcement actions. Petitioners also ignore that other countries have extensive private and public enforcement regimes in place to deter and punish securities fraud. *See infra* Point I.B. Other sovereigns have established their own regulatory

standards for investor protection; the United States in no way stands alone internationally in this regulatory arena. Indeed, foreign regulatory authorities and the Commission routinely work in conjunction successfully to pursue securities enforcement actions with transnational implications. *See, e.g.*, Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, 1743 PLI/Corp. 789, 793 (2009); *see also SEC Speaks in 2010*, 1784 PLI/Corp. 519, 541-42 (2010).

B. Applying Section 10(b) to a Foreign-Cubed Securities Class Action Would Conflict with the Policy Choices of Other Nations

The determination of whether and under what circumstances a class of private individuals may bring a securities class action involves a myriad of policy judgments about which nations can, and do, disagree. The current state of the U.S. private securities class action was born out of decisions on a number of hotly-debated policy questions in an ongoing attempt to achieve what this country believes is the correct balance between protecting investors, deterring wrongdoing, and avoiding vexatious and abusive strike suits.

Not surprisingly, then, material differences exist between the substantive and procedural laws of the United States and of foreign nations in the area of investor protection. In adopting the "fraud on the market" theory of reliance in *Basic Inc. v.*

Levinson, the Court sought to avoid placing an "unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff . . . ." 485 U.S. 224, 241-42, 245-47 (1988). Some countries have rejected the "fraud on the market" theory, making "the United States . . . unusual in recognizing presumed reliance . . . , rather than requiring investors to prove actual reliance on misleading information." Buxbaum, at 61.[8] Others do not require proof of reliance in certain securities cases. *See* Mark L. Berenblut et al., NERA Economic Consulting, *Trends in Canadian Securities Class Actions: 1997-2008*, at 1-2 (2009), *available at* http://www.nera.com/image/PUB_Recent_Trends_Canada_0109_Final.pdf (Canada). At the same time, some nations permit securities claims for conduct that is not actionable in the United States. For instance, Australia recognizes private claims against persons indirectly responsible for false or misleading statements, and allows claims for injunctive relief against aiders and abettors in certain circumstances. *See* Corporations Act, 2001, c. 7 § 1022B(3) (Austl.); Australian Securities and Investments Commission Act, 2001 § 12GD.

In addition to having different substantive standards for establishing securities fraud, nations

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[8] *See, e.g.*, Charles Arsouze & Patrick Ledoux, *L'indemnisation des victimes d'infractions boursières*, 4 Bulletin Joly Bourse 399, ¶¶ 14-15 (2006) (France); Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosures in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621, 640, 655 (2005) (Australia).

also use vastly different procedural mechanisms to govern the assertion of collective private securities claims. Some foreign nations have legislated with the express intent of diverging from the U.S. model for securities class action litigation and the policy choices it embodies. Indeed, some jurisdictions do not allow individuals to bring collective securities fraud claims. In France, for example, securities fraud claims may only be brought on a collective basis by associations that represent investors who opt-in to the procedure. *See* French C. Mon. & Fin. arts. L452-1, L452-2 (2010), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=25&r=899.[9]

Those nations that have adopted some form of class action have requirements distinct from those under Federal Rule of Civil Procedure 23. The Netherlands permits use of its class action mechanism where a group of plaintiffs has negotiated a settlement on the question of liability or damages that it wishes to submit for court of approval; alternatively, associations representing the interests of injured parties may seek a judicial declaration of a defendant's liability—collective litigation of damages is prohibited. *See* Dutch Civil

[9] Similarly, Argentinean federal law allows collective actions only by associations, and only in the context of environmental, civil rights, and consumer goods litigation. *See* Global Legal Group, *The International Comparative Legal Guide to: Class & Group Actions 2010*, at 19 (2009) ("C&G 2010"). Mexican federal law gives the power to bring a suit on behalf of consumer rights only to a specified governmental entity. *See id.* at 119.

Code (Burgerlijk Wetbock) arts. 3:305a, 3:305b (2008). Germany recently adopted a "representative action" statute for securities lawsuits that allows courts to consolidate cases that raise common questions into a "model case" and rule on these issues, but requires individual litigation of each unique element and of individual damages. *See* Bundesministerium der Justiz, *The German 'Capital Markets Model Case Act,'* at 2, *available at* http://www.bmj.bund.de/files/-/1056/EnglishInfo KapMuG.pdf ("German Minister of Justice Statement"). The German Minister of Justice called their recently-enacted law "a way to handle capital market mass proceedings without transferring existing models from foreign jurisdictions, such as the American class action, into German law." *See id.* at 1.

Even in countries where securities class actions are permitted, the class action systems reflect different policy choices. For example, Israel permits class actions where investors can meet the threshold requirement that their claims have a likelihood of prevailing, and South Korea allows them where the class is comprised of at least fifty members who hold at least .01% of a corporation's securities. C&G 2010, at 91 (Israel); Daw Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 J. Comp. L. 165, 175 (2004) (South Korea).[10]

[10] Some nations further diverge from the United States by recognizing a private right of action for only limited types of securities violations. For example, while certain private

The Swiss Parliament has "decided to refrain from introducing a U.S.-style class action practice into its draft code, noting that such a device is foreign to Swiss traditions." Samuel P. Baumgartner, *The Globalization of Class Actions: Switzerland*, 622 Annals Am. Acad. Pol. & Soc. Sci. 179, 180-81 (2009). Italy and Belgium have also recently declined to adopt U.S.-style class action mechanisms, *see* Brief for German and Italian Legal Scholars as *Amici Curiae* at 27-30, Infineon Technologies AG v. Dolan, No. 09-15857 (9th Cir. Sept. 9, 2009) ("German & Italian Scholars' Br.") (Italy); C&G 2010, at 32 (Belgium), and neither Japan, Russia, nor South Africa has developed a class action mechanism. Harold S. Bloomenthal & Samuel Wolff, *International Capital Markets and Securities Regulation* § 54:59 (2009) (Japan); Bernard Black et al., *Legal Liability of Directors and Company Officials*, 2008 Colum. Bus. L. Rev. 1, 13 (2008) (Russia); C&G 2010, at 145 (South Africa).

Also different from the United States, most nations that have enacted collective action regimes require plaintiffs to affirmatively opt-in to a case,

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fraud claims are actionable, the Supreme People's Court of China has ruled that private actions based on claims of insider trading or market manipulation are not. *See* Sanzhu Zhu, *Civil Litigation Arising From False Statements on China's Securities Market*, 31 N.C. J. Int'l L. & Com. Reg. 377, 381 (2005). China has also "ruled out class action suits . . . as an acceptable form of action for civil compensation cases arising from securities-related false statements." *Id.* at 400.

declining to adopt the "opt-out" mechanism of Rule 23(c)(2), which they view as "contrary to public policy." Buxbaum, at 63.[11] Additionally, most civil legal regimes forbid or limit the use of contingency fees,[12] and utilize the "loser pays" rule where the losing party is normally responsible for the other party's costs and fees.[13]

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[11] Countries that have adopted "opt-in" procedures for representative proceedings (in the securities fraud context or otherwise) include: England, Estonia, Finland, France, Germany, Italy, Spain, and Taiwan. *See* Civil Procedure Rule (U.K.) 19.10-.12 (2008); C&G 2010, at 66; *id.* at 74; French C. Com. arts. 225-120, 225-252 (2010), *available at* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6E3121AB386F2B0FA14F42ADCB6AAEFF.tpdjo03v_3?cidTexte=LEGITEXT000005634379&dateTexte=20100221 & C&G 2010, at 80-81; German Minister of Justice Statement, at 2; German & Italian Scholars' Br., at 27-30; Spanish Law of Civil Judgment 1/2000; Lawrence S. Liu, *Simulating Securities Class Actions: The Case in Taiwan*, at 4 (2000), *available at* http://ssrn.com/abstract=251224.

[12] Countries that limit or prohibit the use of contingency fees include: Australia, England, France, Japan, and Switzerland. *See* Duffy, at 652 & C&G 2010, at 30; Winand Emons & Nuno Garoupa, *The Economics of US-style Contingent Fees and UK-style Conditional Fees*, at 2 (Bern University Discussion Paper Series 04-07, 2004), *available at* http://130.92.195.20/publikationen/download/dp0407.pdf; Veronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters*, at 24, *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf (prohibiting arrangements that include only contingency fees or a symbolic non-contingency fee); Bloomenthal & Wolff, § 54:59; C&G 2010, at 150; *see generally* Buxbaum, at 63.

[13] "[T]he general rule in Europe is 'the loser pays[.]'" Laurel J. Harbour & Marc E. Shelley, *The Emerging European*

Underscoring the different policy judgments reached abroad, European Union officials view the United States' use of contingency fees, failure to adopt a "loser pays" rule, and embrace of the "opt-out" mechanism as a "'toxic cocktail' [that] should *not* be introduced in Europe." *Green Paper on Consumer Collective Redress—Questions and Answers*, Memo/08/741, at 4 (Nov. 27, 2008). In other nations' views, contingency fees incentivize "lawyers to take the risk of pursuing claims or to push for new theories of recovery," while the absence of a "loser pays" rule—a rule which imposes discipline on the decision of whether, and how aggressively, to pursue claims—removes an impediment to "filing weak or problematic cases." *See* Harbour & Shelly, at 1. Some countries also believe that the "opt-out" mechanism provides plaintiffs' counsel with a comparatively low-cost method to recruit class members and increase their fee award in the event of success. *See* Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1, 28-29 (2009). Such jurisdictions have found that, combined, these features have the significant effect of "'enabl[ing]' [private] litigation." *See id.*[14]

Class Action, at 11 (ABA Annual Meeting 2006); *see also* C&G 2010, at 22, 46, 69, 77, 94, 122, 128, 138, 142, 149; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Comm. L. World Rev. 123, 144 (2002); Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31 & C&G 2010, at 53; Civil Procedure Rule 44.3(2) (U.K.) (2008).

[14] *See, e.g.*, Harbour & Shelley, at 1 (noting that "Europe has had little litigation compared to the United States" in part due to lack of contingency fees, opt-out system and jury

In addition, some sovereigns have limited the availability of private securities actions because they have chosen to rely more heavily (or even primarily) on government enforcement to protect investors. *See* Buxbaum, at 16; Zhu, at 381-85 (discussing China); Pricewaterhouse Coopers LLP, *2008 Securities Litigation Study* 53 (2009), *available at* http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF (discussing U.K.).

This Court should not subvert these nations' deliberate policy choices—interfering with legal incentives created intentionally to differ from the U.S. legal system—by applying U.S. law to foreign-cubed securities class actions. Such cases effectively circumvent the careful balancing by other nations, when it is their investors, their issuers, and their exchanges or markets that are implicated. "Until the United States is ready to contemplate a system in which even the claims of U.S. investors, based on U.S. trading, are subject to the laws of another country, it is inappropriate to solve the problem of multiple proceedings by suggesting that they all take place in U.S. courts." Buxbaum, at 61; *see also* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 914 (1998) (noting that extraterritorial application of U.S. securities law may cause other countries to retaliate).

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trials, limits on available damages, "loser pays" rule, and rules limiting discovery).

C. Permitting Foreign-Cubed Securities Class Actions Under Section 10(b) Would Undermine Global Coordination of Market Regulatory Efforts

One outgrowth of the financial crisis is that policy-makers, government officials, commentators, and academics agree that global regulatory cooperation is pivotal to ensuring the future stability of financial systems worldwide: "No longer can the United States regulate in a vacuum. Coordination with other national regulators and cooperation with regional and international authorities is required." *See* Committee on Capital Markets Regulation, *The Global Financial Crisis: A Plan for Regulatory Reform*, at i (May 2009), *available at* http://www.capmktsreg.org/pdfs/TGFC-CCMR_Report_(5-26-09).pdf. Indeed, due to the global financial crisis, the Commission and other "national governments and international organizations have taken significant steps both to stem further economic deterioration and to prevent a recurrence of the factors that helped cause it," SEC Strategic Plan for Fiscal Years 2010-2015, Draft for Comments, at 24, *available at* http://www.sec.gov/about/secstratplan1015.pdf, by advancing "international and Commission initiatives aimed to improve investor protection in the wake of the market turmoil," *SEC Speaks in 2010*, at 523.

Extraterritorial application of U.S. securities laws by implied private right of action to the fundamentally foreign activity at issue in foreign-cubed securities claims "cannot help but

interfere with regulatory systems of other countries" and is "likely to generate tensions between the United States and other countries." *See* Choi & Guzman, at 914. Expansion of Section 10(b)'s reach in this current climate would be particularly damaging to international cooperative endeavors.

Any effort at global regulatory cooperation is most appropriately left to a legitimate and centralized government body such as the Commission, and not to individual plaintiffs (or, more accurately, the plaintiffs' bar). As opposed to the Commission, tasked with protecting U.S. investors and the U.S. market, private plaintiffs make claims to remedy their own individual damages. A rule prohibiting the expansion of Section 10(b)'s implied right to foreign-cubed securities class actions will thus keep private plaintiffs from interfering with any cooperative international regulatory efforts.

II. THE PRESUMPTIONS AGAINST EXTRATERRITORIALITY AND EXPANSION OF SECTION 10(b)'S IMPLIED PRIVATE RIGHT BAR FOREIGN-CUBED SECURITIES CLAIMS

A. The Presumption Against Extraterritoriality, Designed to Avoid Conflict with Other Nations' Laws, Precludes Petitioners' Private Securities Claims

The Court has repeatedly affirmed that "United States law governs domestically but does not rule

the world." *See Microsoft*, 550 U.S. at 454. The Court applies the well-established presumption against extraterritoriality "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). "This rule of statutory construction . . . helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155, 164-65 (2004).

As described *supra* in Point I.B, expanding Section 10(b)'s private right of action to foreign-cubed cases would conflict with the careful policy judgments made by other nations, many of whom have considered the U.S. securities class action model and rejected it in adopting their own investment protection regimes. Expansion would also hamper efforts of international coordination for regulating global markets. Given the very real potential for conflict with foreign law that embodies "different policy judgments," *see Microsoft*, 550 U.S. at 455, and the risk of interference with "a foreign nation's ability independently to regulate its own commercial affairs," *Empagran*, 542 U.S. at 165, the presumption against extraterritoriality applies with particular force to preclude foreign-cubed securities cases.

1. Congress did not express any intent indicating that Section 10(b) should apply extraterritorially to permit foreign-cubed claims

Nothing in the text of the Act offers any support for permitting this putative class of foreign plaintiffs to assert a Section 10(b) claim arising from transactions involving the securities of a foreign issuer offered on a foreign exchange or in a foreign market.

In determining whether a statute applies extraterritorially, the Court examines the "'language in the [relevant Act]'" to determine if there is "'any indication of a congressional purpose to extend its coverage'" beyond the territorial limits of the United States. *Aramco*, 499 U.S. at 248 (alteration in original) (citation omitted). Such "indication" must be "clearly expressed"—ambiguous language that "does not speak directly to the question presented" is insufficient to apply the statute to actors or entities abroad. *Id.* at 248, 250-51 (quotation marks and citations omitted); *see also Microsoft*, 550 U.S. at 455-58 ("'[T]he presumption is not defeated . . . just because [a statute] specifically addresses [one] issue of extraterritorial application'" where Congress did not "home in" on specific issue at hand to "'plainly mark[ ]'" Court's course) (citations omitted).

Given the Act's silence as to private rights of action, it is unsurprising that the Act nowhere specifically addresses the question of extraterritorial application to foreign-cubed securities claims. The

language of the Act, however, does confirm the *lack* of congressional intent to apply the statute extraterritorially except in specifically-articulated circumstances inapplicable to a foreign-cubed securities class action.

In particular, Section 30(a) of the Act renders it unlawful for brokers and dealers to use the *U.S.* means of commerce to effect an otherwise prohibited transaction in securities of a *U.S.* issuer on a foreign exchange—creating a clear inference that the Act would not otherwise apply extraterritorially and, in any event, would not extend to transactions effected on a foreign exchange involving a *foreign* issuer. *See* 15 U.S.C. § 78dd (2010). The statute further underscores this point in Section 30(b), which expressly renders the Act inapplicable to "any person insofar as he transacts a business in securities without the jurisdiction of the United States," absent the adoption by the Commission of applicable anti-evasion rules (which it has not done). *Id.*

By specifically articulating this limited area of extraterritorial application in Section 30—which indisputably does not apply here—Congress intended that the Act would otherwise apply only domestically. "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of [creating other] exceptions"—here extraterritorial application—"and, in the end, limited the statute

to the [exceptions] set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).[15]

Petitioners attempt in vain to discern the requisite "clear expression" of intent to reach foreign-cubed claims from the general language in Section 10(b). That section prohibits "any person" from engaging in "any" fraudulent or deceitful act in connection with the purchase or sale of "any security." Petitioners' Br. at 22-24. Such general

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[15] This reading of the Act is consistent with its scant legislative history. The Senate Report on current Section 30(a), *see* 78 Cong. Rec. 2264, 2270 (Feb. 9, 1934), confirms that Section 30(a) is limited to certain broker and dealer "transactions *in American securities* in contravention of the rules and regulations of the Commission." S. Rep. No. 73-792, at 23 (Apr. 20, 1934) (emphasis added). In addition, Thomas Corcoran, one of the key drafters of the Bill, stated during a committee hearing that current Section 30(a) was included to prevent evasion of the Act through the listing of securities of *U.S. issuers* on foreign exchanges. *See* "Stock Exchange Practices," Hearings before the Senate Banking and Currency Committee on S. Res. 84, S. Res. 56 and S. Res. 97, 73d Cong. 6569 (1934). Corcoran also confirmed the Act's domestic reach by stating that now-Section 30(a) was included only to prevent regulation of "the American public's dealing *in their own securities* [from] get[ting] out of [the Act's] jurisdiction." *Id.* (emphasis added). Section 30(b)'s legislative history likewise confirms that the extraterritorial reach of the Act is narrow. The Senate Report describes current Section 30(b) as "provid[ing] that *nothing* in the act or rules and regulations shall apply to business in securities outside the jurisdiction of the United States *unless* such rules and regulations expressly so provide in order to prevent evasion." S. Rep. No. 73-792, at 23 (Apr. 20, 1934) (emphasis added) (discussing precursor to Section 30(b)); *see also* H.R. Rep. No. 73-1383, at 28 (Apr. 27, 1934) (same).

language—along with similar language in the Act's jurisdictional provision, preamble, and certain definitional provisions, *id.* at 13, 20, 22-24—does not constitute the type of pointed language necessary to overcome the presumption and "clearly express" congressional intent for Section 10(b) to have extraterritorial reach to this private action.

Indeed, the Court has held repeatedly that reliance on similarly broad language—none of which "speak[s] directly to the question presented," *Aramco*, 499 U.S. at 250—is too diffuse to overcome the presumption. *See, e.g., id.* at 249-52 (finding that statute's broad definitions of "employer" and "commerce" are mere "boilerplate language" that "falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963) (refusing to find congressional intent to apply National Labor Relations Act abroad even though statute contained broad language that referred to foreign commerce because the act lacked "specific" extraterritorial language); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 30-31 (1925) (finding act declaring "every common carrier by railroad, while engaging in interstate or foreign commerce, shall be liable to its employees" for injury or death "contains no words which definitely disclose an intention to give it extraterritorial effect"); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) ("Words having universal scope, such as

'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."). As this Court observed in *Aramco*, if courts were "to permit possible, or even plausible, interpretations" of broad statutory language "to override the presumption against extraterritorial application, there would be little left of the presumption." 499 U.S. at 248, 253.[16]

2. A stronger case for applying the presumption against extraterritoriality exists here than in *Empagran* or *Microsoft*

The Court recently reaffirmed that Congress legislates "against the backdrop of the presumption against extraterritoriality," *Aramco*, 499 U.S. at 248, when it held in two cases that the antitrust and patent laws did not apply extraterritorially. *See Empagran*, 542 U.S. at 164; *Microsoft*, 550 U.S. at 441-42.

Indeed, *Empagran* and *Microsoft* involved much stronger cases for extraterritorial application of U.S. law. The antitrust and patent statutes reviewed

[16] Petitioners' error in relying on such broad, diffuse language infects their reading of Section 30. *See* Petitioners' Br. at 39-40. Sections 30(a) and (b) are not narrow *exceptions* to the general "extraterritorial ramifications of the statute," *see id.* at 39, 40 & n.16, but rather the sole circumstances for which Congress expressly communicated its intent for the Act to apply extraterritorially.

expressly provide for a significant degree of extraterritorial application, and the plaintiffs proffered reasonable arguments that the facts of their cases fell within those categories. Yet in both cases, the Court invoked the presumption to reject plausible statutory interpretations that would have given the statutes extraterritorial effect. *See Empagran*, 542 U.S. at 164-67, 174 (declining to permit foreign plaintiffs to sue under Sherman Act despite their "more natural reading" of text); *Microsoft*, 550 U.S. at 442, 454-55 (relying on presumption to find Patent Act's extraterritorial component exception inapplicable, even though "[p]lausible arguments [could] be made" for its application). Because the statutes did not clearly speak to extraterritorial application for the circumstances at hand, the Court applied the presumption.[17]

Unlike either the Patent Act or the Sherman Act, the Act is devoid of language indicating intent to apply the operative provision extraterritorially. To the contrary, the Act's sole, narrow carve-out for extraterritorial application in Section 30

[17] Without citation to authority, Petitioners posit "an equally fundamental presumption that, without a clear statement to the contrary, Congress intends to legislate for" *all* conduct within the United States territory. Petitioners' Br. at 33. That is not the law; if it were, the presumption against extraterritorial application would surely never apply. Indeed, both *Empagran* and *Microsoft* involved some, albeit limited, conduct within the United States. *See Empagran*, 542 U.S. at 159; *Microsoft*, 550 U.S. at 441.

indisputably does not apply with respect to foreign-cubed claims under Section 10(b).[18]

Petitioners also attempt to undercut the rationale underlying the presumption against extraterritoriality by stating that "anti-fraud enforcement objectives are broadly similar" and governments "are generally in agreement that fraud should be discouraged." *See* Petitioners' Br. at 35. The Court already rejected this argument in *Empagran*, explaining: "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." 542 U.S. at 167. That is no less true in the securities fraud context, where there are myriad substantive and procedural differences between the United States' private securities fraud regime and those of other nations. *See supra* Point I.B.[19]

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[18] Petitioners inappositely highlight that the antitrust and patent statutes contain language limiting certain application to violations where both conduct and injury occurred in the United States. *See* Petitioners' Br. at 36-37. The salient point is that both statutes also contain language expressly providing for extraterritorial application under relatively broad circumstances—and that language was still found insufficient to overcome the presumption against extraterritoriality for purposes of the plaintiffs' claims. Indeed, Petitioners have turned the presumption on its head by starting from the proposition that statutes apply extraterritorially *unless they state otherwise*, and then asserting that any specific expression of extraterritoriality is a *limit* on a statute's general extraterritorial reach. That is not the law.

[19] Petitioners' proposed use of the *forum non conveniens* doctrine to alleviate comity concerns, *see* Petitioners' Br. at

B. The Presumption Against Expanding Section 10(b)'s Implied Private Right of Action Precludes Petitioners' Claims, Avoiding Harm to U.S. Economic Interests

Section 10(b)'s silence as to extraterritorial application is compounded in the context of foreign-cubed securities class actions by the absence of an express private right. That is, the private cause of action under Section 10(b) is "doubly silent," both as to its extraterritorial scope and as to the source of the private right, because it is "a judicial construct that Congress did not enact in the text of the relevant statute[ ]." *See Stoneridge*, 552 U.S. at 164. The Court thus has broad discretion to limit the reach of this judicially-created remedy where appropriate.

The Court has repeatedly "sworn off the habit of venturing beyond Congress's intent" to create rights of action in order to better effectuate judicial notions of "the 'congressional purpose' expressed by a statute." *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). This applies equally to the private right under Section 10(b): "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present

41-42, ignores the presumption against extraterritoriality. Additionally, such a case-by-case determination, which would "turn on its facts," *id.* at 41, only further magnifies the uncertainty inherent in the "conduct" and "effects" tests. *See infra* Point III; *see also Empagran*, 542 U.S. at 168-69 (rejecting case-by-case comity analysis as "too complex to prove workable").

boundaries." *Stoneridge*, 552 U.S. at 164-65; *see also Virginia Bankshares*, 501 U.S. at 1102.

When invited to expand the reach of Section 10(b)'s implied right, the Court must consider the negative practical consequences of doing so. *See Virginia Bankshares*, 501 U.S. at 1104-06; *Stoneridge*, 552 U.S. at 163-64. Where expansion would cause deleterious results, the Court may rely on such considerations to limit its scope. *See Blue Chip Stamps*, 421 U.S. at 737 (stating that because Congress did not expressly create Section 10(b) private right, it is proper to rely on "policy considerations" when determining its scope); *Stoneridge*, 552 U.S. at 163-64 (finding that negative practical consequences supported narrow reading of Section 10(b)'s private right).

There can be no serious question that a private securities class action may present a unique potential for vexatious litigation, including "strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process," *Virginia Bankshares*, 501 U.S. at 1105, such that "if not adequately contained, [it] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law," *Tellabs*, 551 U.S. at 313. *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (acknowledging "[e]ven weak cases brought under [Section 10(b)] may have substantial settlement value"); *Blue Chip Stamps*, 421 U.S. at 737, 740.

These negative practical consequences are amplified in the international context of foreign-cubed securities claims. As described *supra* at Point I, foreign-cubed securities cases threaten to impair the attractiveness and competitiveness of the United States and its capital markets, create conflict with the laws of other nations, and undermine global coordination for market regulation. Cognizant of these very real risks, the Court in *Stoneridge* observed:

> [o]verseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.

See 552 U.S. at 164 (citation omitted). Such negative ramifications of expanding the Section 10(b) private right here are "good reasons to deny recognition to such claims in the absence of any apparent contrary congressional intent." *See Virginia Bankshares*, 501 U.S. at 1105; *Stoneridge*, 522 U.S. at 163-64; *Blue Chip Stamps*, 421 U.S. at 737.

III. SECTION 10(b)'S IMPLIED PRIVATE RIGHT OF ACTION SHOULD NOT APPLY TO FOREIGN SECURITIES CLAIMS

To encourage foreign investment in the United States, ensure the competitiveness and effective operation of U.S. capital markets, and avoid conflicts

with foreign nations, the Court must adopt a fair rule that provides certainty to foreign securities issuers.

The "conduct" and "effects" tests, with their *ad hoc* analyses that vary from application to application, provide neither fairness nor certainty. Indeed, the "presence or absence of [a] factor which was considered significant" in one case "is not necessarily dispositive" in the next. *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979). Applying the tests, one court observed that "any notion that a single precedent or cohesive doctrine . . . may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005). Further, the "conduct" and "effects" tests—themselves judicial constructions—override the language of the Act and the presumption against extraterritorial interpretation of U.S. statutes, and contradict the Court's directive against expanding the Section 10(b) implied right of action.

Instead, the Court should adopt a bright-line rule that the implied right of action under Section 10(b) does not reach the purchase or sale of a security of a foreign issuer on a foreign exchange or in a foreign market. Such a case is filed by a plaintiff whose injury flows directly and immediately from the foreign defendant's offering of securities in a foreign country. Although such

cases may involve some connection to the United States (here, the foreign defendant invested in the United States by purchasing a subsidiary that is alleged to have engaged in fraudulent accounting), any such connection is insufficient to warrant the application of the U.S. *securities* laws. Section 10(b) provides liability for the inaccuracy of statements made to potential investors *"in connection with the purchase or sale" of a security*, and those statements are necessarily tethered to the foreign country and foreign market in which the purchase or sale occurs. What makes this a *securities* fraud case is the review and publishing of financial metrics outside the United States by a foreign company in connection with securities that sell in a foreign market. Thus, as with any private securities action against a foreign issuer arising out of securities transactions executed in a foreign market, any U.S. connection provides "an indirect chain" that is simply "too remote for liability" for securities fraud under Section 10(b). *See Stoneridge*, 552 U.S. at 149.[20]

[20] According to Petitioners, the fact that the Australian issuer allegedly printed the information furnished by the U.S. subsidiary without modification somehow makes the connection to the United States less remote. The applicability of Section 10(b) should not depend on such a cosmetic issue. In any event, this argument ignores the fact that the Australian company, not the U.S. subsidiary, decided to present the information to its foreign investors.

In addition, this bright-line rule would afford several advantages:

- avoid a fact-intensive analysis of a foreign defendant's conduct in the United States, when ultimately the plaintiff was injured as a result of a securities transaction in a foreign market;
- provide the clarity and predictability that foreign companies need in order to make investments—facilitating the free flow of investment and capital into the United States;
- eliminate the risk of deterring foreign companies from acquiring U.S. subsidiaries for fear of becoming subject to U.S. securities laws even if their securities are not traded in the United States;
- result in jurisprudence that respects the sovereignty of foreign nations by allowing them to establish liability rules best-suited to their markets for transactions that take place there;
- avoid potential interference with global coordination efforts that are essential in the aftermath of the worldwide financial crisis;
- eliminate a reciprocal retaliatory risk to U.S. companies; and
- decrease a risk of duplicative litigation.

Stated simply, investors who buy securities of foreign companies on foreign exchanges or in foreign markets should bring their securities claims exactly where they should expect to have to

bring them—in foreign courts, under foreign law. The bright-line rule proposed by *Amici* provides both certainty and fairness, and comports with the Court's well-established precedent concerning extraterritorial application and implied rights of action.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, *et al.*,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The United Kingdom is committed to the rule of law. It has a comprehensive system of securities regulation and long-established private law remedies. The United Kingdom has made numerous important policy choices regarding securities regulation and litigation practices and procedures. Many of those choices reflect a balancing of interests and policies that differs from the balances that have been struck in the United States.

The Government of the United Kingdom is responsible for formulating and implementing the financial and economic policies of the country. It has a strong interest in ensuring that companies based in the United Kingdom comply with its laws. In addition, as a result of the recent economic crisis, the Government of the United Kingdom has become a significant equity holder in various domestic financial institutions.[2]

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[1] The parties have consented to the filing of all timely *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

[2] For example, the United Kingdom is now an 84% shareholder of The Royal Bank of Scotland Group plc, which entity is a defendant in a securities class action fraud case currently pending in the Southern District of New York. *In re Royal Bank of Scotland Group plc Sec. Litig.*, No. 1:09-CV-00300 (S.D.N.Y., filed Jan. 12, 2009).

Although there is no U.K. party in this case, the broad assertion of extraterritorial jurisdiction by United States courts implicates the legitimate sovereign interests and policy choices of the United Kingdom. The risk of infringing upon the sovereignty of other nations is a particular concern with respect to the regulation of securities transactions, especially in cases involving foreign purchasers, a foreign issuer, and alleged harm suffered in transactions on a foreign securities exchange (so-called "foreign-cubed" securities cases).

The United Kingdom has previously voiced its concerns about an expansive extraterritorial application of United States law.[3] This Brief reiterates and articulates those concerns in the specific context of private securities litigation.

SUMMARY OF ARGUMENT

The United Kingdom respectfully submits that the proper recognition of the sovereignty of other nations, the development of sophisticated regulation of the issuance and trading of securities within numerous nations, the globalization of capital markets, the increasing interdependence of national

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[3] *See, e.g.*, Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of Petitioners, *F. Hoffman-La Roche v. Empagran S.A.*, 542 U.S 155 (2004) (No. 03-724); Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

economies and principles of comity and international relations all support the affirmance of the result reached below by the United States Court of Appeals for the Second Circuit.

The United Kingdom also respectfully urges this Court to use this opportunity to set forth a clear rule limiting the extraterritorial application of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act")[4] and Rule 10b-5[5] promulgated thereunder by the Securities and Exchange Commission ("SEC").[6]

The policy interests addressed herein would be best served by adoption of the following rule:[7]

> Foreign purchasers of securities on a foreign exchange who are injured by misleading statements or omissions made outside of the United States by a foreign issuer have no private right of action under § 10(b) or Rule 10b-5.

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[4] 15 U.S.C. § 78j(b).

[5] 17 C.F.R. § 240.10b-5 (2007).

[6] Petitioners argue, and Respondents accept, that the formulation of the issue as one of subject matter jurisdiction is incorrect. *See* Brief for Petitioners 15-32; Brief for Respondents 22. The United Kingdom takes no position.

[7] This proposed rule is addressed to claims by foreign investors, since those are the claims considered below and now before this Court. The policy considerations set forth herein apply also to claims by U.S. investors purchasing securities of a foreign issuer on a foreign exchange.

In the alternative, if a private right of action is to be potentially available in these circumstances, then these same policy interests would be served by the following clarification in the test promulgated to govern "foreign-cubed" securities cases:

> Fraudulent conduct occurring in the United States that does not itself constitute deceptive acts in connection with the sale of securities is insufficient to create liability under § 10(b) and Rule 10b-5.

The considerations described herein, as well as long-established principles of U.S. law, support the adoption by this Court of either of these alternative rules of law concerning the applicability of § 10(b) of the Exchange Act and of Rule 10b-5.

ARGUMENT

I. THE U.K. REGULATORY AND LEGAL SYSTEMS AND ESTABLISHED U.S. POLICIES AND PRECEDENTS PROVIDE IMPORTANT CONTEXT FOR THE RESOLUTION OF THE ISSUES HERE PRESENTED

A. The U.K. Regulatory and Legal Systems Provide Adequate Remedies for Securities Fraud, yet Differ in Important Respects from the U.S. Systems

We set out below a brief overview of the U.K. regulatory and legal systems governing the issuance and trading of securities.[8] This overview underscores two points, each central to the arguments that follow: (i) the U.K., like many other nations, has a sophisticated financial regulatory system and substantive and procedural rules for remedying securities fraud; and (ii) the U.K.'s

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[8] Although we refer in this Brief to the laws of the United Kingdom, the U.K. is in fact comprised of three jurisdictions: England and Wales; Scotland; and Northern Ireland. The principal statute regulating securities disclosure, the Financial Services and Markets Act 2000 ("FSMA"), applies throughout the U.K. Financial Services and Markets Act 2000, 2000, c. 8 (U.K.) (as amended 2006). In the other areas relevant to this Brief, the substantive law in effect in all three jurisdictions is substantially similar although each jurisdiction has its own courts and rules of civil procedure. For simplicity, this Brief uses terminology and references appropriate to England and Wales.

approach to securities regulation and litigation differs in important respects from that of the U.S., and those differences represent legitimate policy choices and sovereign interests that ought to be respected by the United States.

1. The U.K. Financial Markets Are Subject to Strict Disclosure Obligations

The European Union ("E.U.") Prospectus Regulation[9] sets out the content requirements for prospectuses issued by U.K. and other E.U. companies. The liability regime for prospectuses is set out in the FSMA and rules made under it.[10] Similarly, the FSMA and associated rules provide for a liability regime and specify requirements for periodic disclosures, such as annual and bi-annual financial reports and interim management statements, to be issued by companies whose shares are admitted to trading on a regulated market.[11]

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[9] Commission Regulation 809/2004, O.J. 2004 L 149/1, corrected by O.J. 2004 L 215/3. In the areas of requirements for prospectuses, periodic financial disclosures and other ad hoc disclosure requirements for issuers whose securities are admitted to trading on a E.U.-regulated market, the E.U. has adopted Regulations and Directives harmonizing laws among the E.U. member states. Regulations of the E.U. automatically become part of the laws of a E.U. member state upon their coming into force. Directives of the E.U. are transposed into the laws of a member state by domestic legislation.

[10] *See* Financial Services Authority Prospectus Rules, *available at* http://fsahandbook.info/FSA/html/handbook/PR.

[11] *See* Financial Services Authority Disclosure Rules and Transparency Rules (DTR), *available at* http://fsahandbook.info/

The U.K. has (along with the rest of the E.U.) adopted a stringent "continuous disclosure" regime under which, subject only to specified exceptions, an issuer whose shares are admitted to trading on a regulated market must announce without delay any precise information directly concerning it which would be likely to have a significant effect on the price of its securities.[12]

The Financial Services Authority ("FSA") is an independent statutory authority responsible for the regulation of financial services and markets in the U.K., and related enforcement activities. The enforcement powers of the FSA include the powers to: impose penalties for a breach of its listing rules, disclosure rules, prospectus rules or transparency rules;[13] impose penalties for market abuse;[14] bring criminal proceedings for specified misleading statements and practices;[15] fine or censure authorized firms;[16] apply for an injunction where there is reasonable likelihood of contravention, or continuing contravention, of the FSMA;[17] and order

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FSA/html/handbook/DTR. Rules 4.1-4.3 address periodic financial reporting.

[12] *See* DTR 2.2.

[13] FSMA Pt. VI, § 91.

[14] FSMA Pt. VIII.

[15] FSMA Pt. XXVII, § 397.

[16] FSMA Pt. XIV.

[17] FSMA Pt. XXV, §§ 380-381.

restitution where any such provision has been contravened.[18]

2. U.K. Law Provides Multiple Potential Causes of Action for Securities Fraud

U.K. law provides multiple potential causes of action—at common law and under statute—for persons who suffer loss in connection with alleged misstatements or omissions in prospectuses and other securities disclosures.

At common law, actions may be available for fraud or deceit, negligent misrepresentation, and innocent misrepresentation. Common law liability may arise not only from affirmative misrepresentations, but also from omissions in cases where there is a duty to disclose. Such actions may also be available where an omission has the effect of rendering a statement misleading.

The FSMA provides statutory causes of action in connection with prospectuses and other prescribed disclosures. Specifically, § 90 of the FSMA provides that a person who acquires securities to which a prospectus applies has the right to claim compensation for loss suffered as a result of any untrue or misleading statement in the prospectus or the omission of any matter required to be included. Section 90 does not specify a requirement of

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[18] FSMA Pt. XXV, §§ 382-384.

"reliance"[19] nor does it require a showing of scienter, liability being presumed unless a due diligence defense can be established. The FSMA also provides the right to claim compensation for a false or misleading financial report or other prescribed statement.[20]

3. The U.K. Has a Sophisticated Legal System Available for the Litigation of Securities Claims, Including Procedures for Group Litigation

There is no impediment to a court in the U.K. having jurisdiction to hear a claim brought by any plaintiff, irrespective of domicile or nationality, against a company incorporated in that part of the U.K., unless a court in another part of the European Economic Area[21] is already seized of the case. However, in cases involving non-E.U. defendants, the court may decline to take jurisdiction by reason of *forum non conveniens*. There is no significant delay in bringing large civil cases to trial in the High Court

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[19] *See generally* Paul Davies, *Liability for Misstatements to the Market* ¶ 27 (Mar. 2007), *available at* http://www.hm-treasury.gov.uk/d/davies_discussionpaper_260307.pdf [hereinafter "Davies Review"].

[20] FSMA Pt. VI, § 90A. This Brief is not intended to contain an exhaustive enumeration of all remedies that may be available at common law or under statute; for example, § 2(1) of the Misrepresentation Act 1967 also provides a cause of action for certain misrepresentations made in pre-contract negotiations by one party to another. Misrepresentation Act 1967, 1967, c. 7, § 2(1) (Eng.).

[21] Except for Liechtenstein.

of Justice,[22] which is the court of first instance for most securities matters.

The proceedings available to a claimant in England and Wales include multi-party litigation under the Group Litigation Order procedure, an "opt-in" procedure.[23] In line with the usual English rule, costs follow the event in group litigation. Conditional fee agreements are permitted in litigation in U.K. courts, subject to restrictions;[24] however, contingency fees are not permitted.[25] Litigation funding is not per se prohibited, but agreements may be unenforceable if they tend to corrupt public justice or threaten the integrity of the

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[22] A significant reduction in the number of medium and large cases taken to the High Court since 1999 has ameliorated congestion in that Court. *See generally* Neil H. Andrews, *The Modern Civil Process* 10.08 (2008).

[23] *See* Civil Procedure Rules ("CPR"), 19.10-19.15, *available at* http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm.

[24] *See, e.g.*, Courts and Legal Services Act 1990, 1990, c. 41, §§ 58, 58A (U.K.); CPR 43-45.

[25] *See* Solicitors Act 1974, 1974, c. 47, § 59 (U.K.); Courts and Legal Services Act 1990, § 58(1); Solicitors Code of Conduct, R. 2.04 (2007).

litigation process.[26] Trial by jury is rare in U.K. private securities fraud litigation.[27]

The regime for issuer liability, the forms of collective proceeding available to claimants and civil litigation costs have all recently been the subject of specific policy reviews in the United Kingdom:

> (i) Issuer liability: the FSMA was enacted only after extensive consultation and legislative scrutiny. A subsequent Review of Issuer Liability incorporated consultation with a wide range of interested parties.[28]
>
> (ii) Collective proceedings: reforms of the law relating to collective proceedings

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[26] *See Mansell v. Robinson*, [2007] EWHC 101, ¶¶ 5-7 (Q.B.) (Underhill, J.). Section 58B of the Courts and Legal Services Act 1990 would provide statutory recognition to the concept of third party litigation funding, but the section has not been brought into force.

[27] Trial of civil fraud actions is, in principle, by jury. However, a claim for compensation in respect of a prospectus under § 90 of the FSMA does not require a showing of fraud. *See* Davies Review, *supra* note 19, at ¶¶ 27-28. Moreover, even in fraud cases, jury trial is not required if "the court is of the opinion that the trial requires any prolonged examination of documents or accounts": Senior Courts Act 1981, 1981, c. 54, § 69 (Eng.) (with respect to the Queen's Bench Division); *see generally* Davies Review, *supra* note 19, at ¶ 114.

[28] *See* Davies Review, *supra* note 19; Ministry of Justice, *The Government's Response to the Civil Justice Council's Report: "Improving Access to Justice through Collective Actions"* (July 2009), *available at* http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf [hereinafter "Government Response"].

were considered in depth by the Civil Justice Council, to whose report the Government issued a reasoned response.[29] The U.K. Government has recently introduced a Financial Services Bill to Parliament[30] which, if enacted, will make provision for collective proceedings (on an "opt-in" or "opt-out" basis, in the court's discretion) against persons engaged in financial services or payment services business in respect of claims arising in connection with the services provided by them. The U.K. Government has, however, chosen not to create a general "opt-out" class action regime for securities litigation against issuers.

(iii) Civil litigation costs: a senior judge has just completed a Review of Civil Litigation Costs, the Final Report of which was published in January 2010.[31] The Review recommends that (other than in personal injury, defamation and judicial review cases) the rule should continue to be that the loser pay the winner's costs, with the court having discretion to order otherwise to better facilitate access to justice.[32] The Review also

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[29] *See* Government Response, *supra* note 28.

[30] Financial Services Bill 2009, Bill [6] (Eng.).

[31] Rt. Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (Dec. 2009), *available at* http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf [hereinafter "Jackson Report"].

[32] *Id.* at 334, 329, 310.

proposes that contingency fee arrangements should be permitted subject to conditions to safeguard the interest of clients.[33] These recommendations will now be studied by the U.K. Government.

B. Relevant U.S. Policies and Precedents Are Well-Settled

The parties and other *amici* have fully described the relevant precedents and long-established principles of U.S. law that provide the basis on which the issues raised by the Petition should be analyzed. We simply list the key points.

(i) Absent express congressional direction to the contrary, U.S. laws are presumed to apply only within the United States. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

(ii) Absent express congressional direction to the contrary, principles of comity and customary international law are to guide U.S. courts in interpreting legislation, so as to "avoid unreasonable interference with the sovereign authority of other nations". *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *see* Restatement (Third) of the Foreign Relations Law of the United States §§ 403(1), 403(2) (1987) [hereinafter "Restatement"].

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[33] *Id.* at 133.

(iii) The Exchange Act contains no express congressional direction as to the extraterritorial application of § 10(b). The only language in the U.S. Securities Acts that is relevant to the question clearly suggests a lack of intended application outside the United States.[34]

(iv) The private right of action under Rule 10b-5 is a judicially created implied right to be expanded only with caution. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-166 (2008).

(v) In actions brought by private parties, there is no liability under § 10(b) for "aiding and abetting". *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994).

(vi) In actions brought by private parties, there is no liability under § 10(b) for misleading acts or statements upon which investors did not rely. *Stoneridge*, 552 U.S. at 166-167.

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[34] The Exchange Act and any rule or regulation made thereunder "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate to prevent the evasion of [the Exchange Act]." 15 U.S.C. § 78dd(b) (2000). No such rules and regulations have been prescribed.

II. THERE ARE SERIOUS AND SUBSTANTIAL POLICY CHOICES EMBODIED IN THE REGULATION OF THE ISSUANCE AND EXCHANGE OF SECURITIES

The Second Circuit, Petitioners and several *amici* have seriously underestimated the range and importance of legitimate differences that exist with respect to securities regulation.[35] The conclusory observation that there can be no serious objection by a foreign sovereign to the application of a more stringent U.S. standard for fraud[36] ignores highly significant consequences of the extraterritorial application of the U.S. securities laws, especially of the Rule 10b-5 private right of action.

Similarly, the assertion by Petitioners—and in the Restatement—that there is no record of conflicts between the securities fraud provisions of the United States and those of foreign nations[37] is misleading. There are substantive differences reflecting legitimate policy choices. Moreover, the panoply of procedural rules and remedies that accompany litigation in federal courts under U.S. securities laws

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[35] *See, e.g., Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 175 (2d Cir. 2008); Brief for Petitioners 35-42; Brief for Alecta Pensionsförsäkring, Ömsesidigt, AmpegaGerling Investment GmbH, APG Algemene Pensioen Groep N.V., ATP - Arbejdsmarkedets, *et al.* as *Amici Curiae* 20-22.

[36] *See, e.g., Morrison*, 547 F.3d at 175 (citing *IIT, Int'l Inv. Trust v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980)).

[37] *See* Brief for Petitioners 38; Restatement § 416, Reporters' Note 3.

creates a very different environment for the commencement, prosecution and settlement of lawsuits than exists in other jurisdictions. Application of U.S. securities laws brings with it the full force of the U.S. legal system and real conflicts with other legal systems.

A. Reasonable Policy Makers Can and Do Differ as to Substantive Disclosure Standards

All securities regulatory regimes impose disclosure obligations on issuers. But, the precise contours of those obligations differ in important respects, including as to the subject matter of required disclosures and methods of establishing a contravention of the substantive standards.

As to the subject matter of required disclosures, both the United States and the United Kingdom require, in various contexts, disclosure of "material" information, yet materiality is defined in different ways. In the U.S., "material" is understood to mean that the information "may affect the desire of investors to buy, sell, or hold the company's securities", *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968) (en banc), and would have been regarded by a "reasonable investor as having significantly altered the 'total mix' of information available". *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). In the U.K., the statutory formulation of disclosure obligations varies with the type of corporate statement (prospectuses and other fund-raising documents, periodic corporate reports and ad hoc corporate announcements). As one example, in issuing a prospectus, a company whose

shares are admitted to trading on a regulated market must meet enumerated disclosure obligations and must also disclose other information "necessary to enable investors to make an informed assessment of" the issuer and the securities on offer.[38]

These differences in materiality formulations are not only matters of language or nuance; they reflect legitimate policy decisions, such that disclosure obligations differ in critical respects between jurisdictions. The same analysis is true with respect to the requirements for establishing a violation of disclosure obligations and, in particular, whether plaintiffs can rely on the "fraud on the market" theory. In U.S. securities law, the fraud on the market theory represents judicial acceptance of one strand of financial economics,[39] while in the U.K. a similar principle exists by virtue of the statutory formulation of the cause of action for a misleading prospectus under § 90 of the FSMA, which does not require proof of reliance.[40] For periodic financial reports, however, reliance is a necessary condition to a claim in the U.K., for which a higher fraud-based standard of liability is designed to reduce the risk of "unmeritorious claims for large sums" and of "encourag[ing] defensive and bland reporting".[41] The

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[38] FSMA Pt. VI, § 87A.

[39] *See Basic Inc. v. Levinson*, 485 U.S. 224, 241-247 (1988).

[40] *See* Davies Review, *supra* note 19, at ¶ 27.

[41] Paul Davies, *Final Report* ¶¶ 18, 9 (June 2007) *available at* http://www.hm-treasury.gov.uk/d/davies_review_finalreport_040607.pdf.

common law causes of action in England and Wales continue to require proof of actual reliance.

Thus, under the major national regulatory schemes, issuers face different substantive disclosure requirements and plaintiffs confront different burdens in establishing a contravention of those requirements. Such differences arise even as between jurisdictions that have well-developed securities regulatory regimes, such as the U.K. and the U.S.

B. Reasonable Policy Makers Can and Do Differ as to the Desirability of a Private Right of Action for Alleged Securities Fraud

Reasonable policy makers can and do differ as to the desirability and appropriateness of even having a private right of action against an issuer for securities fraud. Unlike a claim against an individual wrongdoer that would be paid from personal assets, a claim against a public company by former shareholders, if successful, imposes the costs of compensation for losses on current shareholders. Often the current shareholders were not owners of the company at the time of the wrongdoing. In such cases, the result can be a mere transfer of wealth from one group of innocent investors to another, with large transaction costs in the form of legal fees and expenses. To the extent current shareholders were also shareholders at the time of the fraud, then the transfers will be to oneself, with the subtraction of large transaction costs. It is not obvious that such a right of action is good policy; it is obvious, however, that it is not the only reasonable policy.

C. Reasonable Policy Makers Can and Do Differ as to Other Important Procedural Choices

Jurisdiction in U.S. courts brings a host of procedural ramifications that are potentially inconsistent or in conflict with the policy choices made in other jurisdictions, including the U.K. Such matters include:[42]

(i) The scope of discovery;

(ii) The availability of class actions or other forms of multi-party litigation;

(iii) The availability of "opt-out" classes, whether by default or in the court's discretion;

(iv) The availability of contingency fee arrangements for plaintiffs' counsel;

(v) The availability of attorney fee awards against an unsuccessful party;

(vi) The legality of third-party litigation funding;

(vii) The availability of jury trials; and

(viii) The expected time to bring a case to trial.

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[42] We have set out, *supra* Part I.A.3, the rules applicable in the U.K. on each of these matters.

Each of these procedural matters shapes the incentives to pursue legal redress in a particular jurisdiction[43] and may have a material impact on the outcome of a given case. Moreover, the proper policy choice as to each is neither obvious nor the subject of widespread agreement.[44] In fact, the long U.S. experience with the choices it has made with respect to many of these matters has given rise not to internal unanimity and consensus, but to increasingly serious controversy and proposals for change.[45]

Most importantly, the assertion by the Second Circuit that "anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged", *Morrison*, 547 F.3d at 175, may be true, but is not pertinent to the analysis here. It fails to recognize and credit the diverse interests of other nations' legal and regulatory schemes. Attempts by Petitioners[46] to distinguish the present case from this Court's jurisprudence on the

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[43] *See, e.g.*, Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for the Advancement of the Am. Legal Sys., *Final Report* 9 (Mar. 11, 2009), *available at* http://www.actl.com/ (follow "All Publications" hyperlink; then follow "ACTL-IAALS Official Final Report" hyperlink) (discussing how U.S. procedural rules may incentivize defendants to settle even unmeritorious claims) [hereinafter "Task Force Report"].

[44] *See, e.g.*, Jackson Report, *supra* note 31, at chs. 12, 33, 37. As to the availability of jury trials, *see* Andrews, *supra* note 22, at § 2.39 n. 93.

[45] *See, e.g.*, Task Force Report, *supra* note 43.

[46] *See, e.g.*, Brief for Petitioners 36-38, 40.

extraterritorial application of U.S. antitrust and patent law based on this assertion fail for the same reason.[47]

III. SIGNIFICANT REGULATORY AND COMMERCIAL INTERESTS ARE AT STAKE IN THE ISSUES HERE PRESENTED

The fundamental interest at stake is the right of sovereign nations to make these policy determinations for themselves and to have their choices respected by other nations. This Court has

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[47] In *Empagran*, the Court held that application of the Sherman Act to purely foreign economic injury risked interfering with the competition laws of other countries, which may diverge from U.S. antitrust laws. 542 U.S. at 167. In particular, the Court emphasized the relative novelty of treble damages in private U.S. antitrust actions, and the risk that incentives to participate in foreign competition authorities' leniency programs would be diminished if foreign injury could be pursued in U.S. private actions. *Id.*

In *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441-444, 454-455 (2007), a patent case, the Court applied the "presumption that United States law governs domestically but does not rule the world" to buttress its conclusion that U.S. patent law does not apply to certain foreign activities. The presumption applies with equal force here. Petitioners argue that there is a relevant difference in giving foreign citizens redress in U.S. courts for fraudulent conduct that occurred here, but as we show in Part V below, restraining the extraterritorial application of § 10(b) and Rule 10b-5 would not deny remedies for fraud that occurs in the U.S. and would not leave an enforcement void: both securities and non-securities fraud claims could be pursued abroad, and action might be taken domestically by the SEC in appropriate cases or by private plaintiffs in state courts.

recognized that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Arabian American Oil Co.*, 499 U.S. at 248 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Further, "United States law governs domestically but does not rule the world", *Microsoft*, 550 U.S. at 454, and "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953). It is especially inappropriate to apply U.S. laws to claims that "may embody different policy judgments". *Microsoft*, 550 U.S. at 455. The regulation of securities markets involves exactly the kind of "policy judgments" where sovereignty should be respected and expansive extraterritorial application of U.S. law is inappropriate.

Nations have a strong interest in regulating their own capital markets, developing disclosure rules to govern their own issuers, deciding how and when class action shareholder litigation should occur and determining the penalties for violations of such laws. Such decisions vary among countries with different regulatory, legislative and financial concerns. U.S. judicial interference in those decisions risks damaging the mutual respect that comity is meant to protect and could be perceived as

an attempt to impose American economic, social and judicial values.[48]

In addition to general policy concerns regarding comity, extending the extraterritorial scope of Rule 10b-5 carries several specific risks.

A. Extraterritorial Extension of the Rule 10b-5 Private Right of Action Can Undermine Cross-Border Cooperation

The international community has made a commitment to strengthening cross-border cooperation in the consistent regulation of financial markets. In late 2008, the Group of 20 (G-20) issued a declaration on the financial crisis. It reaffirmed its commitment to reinforcing international cooperation and strengthening international regulatory standards while noting that "*[r]egulation is first and foremost the responsibility of national regulators* who constitute the first line of defense against market instability" and that "[r]egulators must ensure that their actions support market discipline, *avoid potentially adverse impacts on other countries,* including regulatory arbitrage, and support competition, dynamism and innovation in the marketplace." G-20, *Washington Declaration: G-20 Summit on Financial Markets and the World Economy* ¶ 8 (Nov. 15, 2008), *available at* http://www.g20.org/Documents/g20_summit_declaration.pdf (emphasis added).

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[48] *See* Restatement § 403, cmt. g (stating that statutes should be construed to avoid "conflict with the law of another state that has a clearly greater interest").

The U.K. and the U.S. have been active in promoting cross-border cooperation in the field of securities regulation and supervision, both through international organizations such as the G-20 and the International Organization of Securities Commissions and through bilateral cooperation initiatives. The close cooperation of the U.K. FSA and the U.S. SEC in securities law enforcement matters is supported by their broader strategic dialogue on matters of common interest.[49]

Expansive extraterritorial application of the Rule 10b-5 private right of action risks undermining the kind of global regulatory cooperation that the current economic situation demands and the G-20 calls for. The effectiveness of any action by a foreign regulator—such as the U.K. FSA—is threatened by the unpredictable specter of private litigation in U.S. courts.[50]

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[49] *See* Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Services Firms, SEC-FSA, Mar. 14, 2006, at http://www.sec.gov/about/offices/oia_multilateral/ukfsa_mou.pdf [hereinafter "MOU"].

[50] The FSA has recently revised its enforcement guidance to include specific provisions for leniency in respect of cooperation. On January 13, 2010, the SEC also adopted new tools to "foster cooperation" and create greater incentives for individuals and companies to cooperate with its regulations. These tools include proffer agreements, cooperation agreements and deferred prosecution and non-prosecution agreements. Press Release, SEC, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at* http://www.sec.gov/

B. Extraterritorial Extension of the Rule 10b-5 Private Right of Action Can Impede Open Capital Markets

The United Kingdom believes that open, effectively regulated and efficiently functioning financial markets bring economic benefits to all participants.[51] The President of the United States has also recently reiterated his support for open capital markets.[52]

Extraterritorial extension of the Rule 10b-5 private right of action may impede open capital markets. It substantially raises the risk of exposing foreign issuers to unforeseen class actions, thereby discouraging foreign investment in United States businesses and inhibiting cross-border capital flows. Application of U.S. securities laws to foreign issuers engaged in foreign transactions raises the cost of doing business in the U.S. and could deter

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news/press/2010/2010-6.htm. Incentives for foreign issuers to take advantage of these tools and cooperate with securities regulators are diminished by the unpredictable risk of private litigation in U.S. courts.

[51] *See generally* H.M. Treasury, *Embracing Financial Globalisation* (May 2008), *available at* http://www.hm-treasury.gov.uk/d/embracing_financial_globalisation300508.pdf.

[52] *See* Nat'l Econ. Council & Office of Sci. and Tech. Policy, Executive Office of the President, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs* 15-16 (Sept. 2009).

corporations from operating within the U.S. or participating in U.S. financial markets.[53]

As this Court has recently reiterated, "[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals

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[53] The Schumer-Bloomberg Report found that meritless securities class action lawsuits and settlements in the United States with their attendant costs and possibility of director and officer liability have made London and other European capitals more attractive venues for listing and investment for some businesses than the United States. *See* Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 73-78 (Jan. 2007), *available at* http://www.abanet.org/buslaw/committees/CL116000pub/materials/library/NY_Schumer-Bloomberg_REPORT_FINAL.pdf [hereinafter "Schumer-Bloomberg Report"]. This Court recognized similar concerns in *Stoneridge*, 552 U.S. at 164.

Indeed, during the recent round of speculation about cross-border mergers of stock exchanges, the SEC took pains to reassure foreign stock exchanges that their association with U.S. counterparts would not result in an exportation of the entire U.S. legal and regulatory regime to public companies listed on their markets. *See* Press Release, SEC, SEC Office of International Affairs and Divisions of Market Regulation and Corporation Finance Release Fact Sheet (June 16, 2006), *available at* http://www.sec.gov/news/press/2006/2006-96.htm. The SEC has also explained that it wishes to remove "a disincentive to foreign private issuers accessing the U.S. public capital markets". *See* Termination of a Foreign Private Issuer's Registration of a Class of Securities, Exchange Act Release No. 34-55540, 72 Fed. Reg. 16934-01, 16934-35 (Apr. 5, 2007). The SEC has recognized that enabling foreign companies to avoid the application of U.S. securities law requirements in appropriate circumstances will make the U.S. a more attractive venue for listing and investment.

whose conduct conforms to the law". *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).[54] Such class actions "disruptively expos[e] foreign corporations to a litigation environment in which plaintiffs arguably have undue leverage", and "the United States' foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities." John C. Coffee, Jr., *Global Class Actions*, Nat'l Law J., June 11, 2007, at 12.

At the same time, a concern that some jurisdictions may not have regulatory and legal systems that are perceived as adequate does not justify or necessitate the U.S. taking on the role of international securities policeman. Investors knowingly buy into the financial, legal and regulatory regimes of the jurisdictions in which they purchase or trade securities. Inherent in their investment decisions—and in the global flow of capital—is a choice of varying safeguards. The market will align incentives appropriately if issuers are held responsible by the jurisdiction in which they have issued their securities and if investors know they can seek redress for harms in the jurisdiction in which they purchased or traded securities. Indeed, such a restrained approach should encourage less

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[54] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) ("There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.").

developed financial regulatory regimes to adopt clear and enforceable rules to encourage investment in their financial markets.

C. Extraterritorial Extension of the Rule 10b-5 Private Right of Action Risks Multiple Litigations and Inconsistent Determinations

Serious doubt exists as to whether a judgment or court-approved settlement in a U.S. securities class action would bind a non-U.S. plaintiff who did not opt out of the class. This issue has been addressed directly in only one English case, where the judge, *obiter*, expressed doubt as to whether a foreign "opt-out" class action could give rise to *res judicata*.[55] Thus, since the common law of England and Wales and U.K. legislation provide various causes of action for misstatements and omissions in connection with securities, it is possible that plaintiffs could have two bites of the apple and defendants could face inconsistent outcomes. There is the accompanying risk that the "precious resources of United States courts and law enforcement agencies" could be devoted to cases that may be unfairly duplicated in other jurisdictions. *Bersch v.*

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[55] *Campos v. Kentucky and Indiana Terminal Railroad*, [1962] 2 Lloyd's Rep. 459, 473 ("[T]here is great force in [the] contention that in accordance with English private international law a foreign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment.") (McNair, J.).

Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975).

IV. THIS COURT SHOULD ADOPT CLEAR RULES LIMITING THE EXTRATERRITORIAL SCOPE OF § 10(b) AND RULE 10b-5

For the reasons set forth above, the United Kingdom respectfully submits that this Court should affirm the result reached below by the United States Court of Appeals for the Second Circuit and use this opportunity to set forth a clear, simple rule limiting the extraterritorial scope of § 10(b) and Rule 10b-5.

A. Foreign Purchasers of Securities on a Foreign Exchange Who Are Injured By Misleading Statements or Omissions Made Outside of the United States By a Foreign Issuer Should Have No Private Right of Action Under § 10(b) or Rule 10b-5

The United Kingdom respectfully urges this Court now to rule that foreign purchasers of securities on a foreign exchange who are injured by misleading statements or omissions made outside of the United States by a foreign issuer have no private right of action under § 10(b) of the Exchange Act or Rule 10b-5.[56]

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[56] This case involves claims by foreign investors, so the proposed rule is addressed to such claims. *See supra* note 7.

Adoption of this rule would eliminate the risks presented by the current uncertainty surrounding the extraterritorial application of § 10(b) and Rule 10b-5. Such a clear pronouncement by this Court would reassure foreign states that their individual legal and regulatory interests will be respected; it would also ensure that the adequacy of disclosure made in their jurisdiction by entities in their jurisdiction with respect to securities issued in their jurisdiction would be decided under the laws of their jurisdiction by the courts and regulatory agencies of their jurisdiction. It would allow issuers to plan their global affairs and assess their potential legal exposure with greater confidence and provide investors with a clearer understanding of where they can seek relief for alleged securities fraud. These benefits would enhance the efficiency not only of the legal system, but also of the financial markets on which issuers and investors interact.

B. In the Alternative, if a Private Right of Action Is Available, Fraudulent Conduct in the United States That Does Not Constitute Deceptive Acts in Connection with the Sale of Securities Should Be Insufficient to Create Liability Under § 10(b) or Rule 10b-5

Many of the submissions obfuscate the issues at stake here by the careless or misleading use of the phrases "fraud" and "fraudulent scheme".[57] The

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[57] *See, e.g.*, Brief for Petitioners 7 ("The central allegation of Petitioners' claims is that the fraudulent scheme occurred in

Exchange Act, like the federal interests it promotes, is concerned not with "fraud", but with "securities fraud"—deceptive acts "in connection with the purchase or sale of any security". Only such acts can give rise to liability under Rule 10b-5 under any of the three conditions described by Petitioners (use of interstate commerce, use of the mails, or use of any national securities exchange).[58]

The Second Circuit considered the question of where the allegedly fraudulent activity "in connection with the purchase or sale of securities" had occurred.[59] It concluded that the activity "in connection with the purchase or sale of securities" was the conduct in Australia of the Australian parent in making disclosures relevant to the trading of its stock.[60]

The principles addressed herein support the rule that regulation of and punishment for securities fraud should be the concern of the sovereign jurisdiction in which the securities fraud occurs—that is, the jurisdiction in which the actors who made the disclosures reside, the relevant exchanges are located and the primary adverse impact on investors is felt.

Florida."); *id.* at 10 ("The foregoing allegations of fraud were all committed in the United States.").

[58] *See* Brief for Petitioners 13-14.

[59] *See Morrison*, 547 F.3d at 175-177.

[60] *Id.* at 171, 176.

Therefore, if a private right of action is to be potentially available to foreign investors in foreign issuers who purchased on foreign exchanges, then the United Kingdom respectfully suggests that this Court should hold that conduct in the U.S. can create liability under the Exchange Act only if that U.S. conduct in fact constitutes deceptive acts in connection with the sale of securities.[61] It should not be enough that plaintiffs allege fraudulent conduct in the U.S. that has a potential effect on the price of a security or on some subsequent market disclosure. As in this case, there may be wrongdoing that could constitute fraud on an employer, a parent entity, a supplier or a customer, but such conduct is not within the province of the Exchange Act. Misconduct within a corporate structure does not become "securities fraud" simply because it could be foreseen to impact a publicly traded security.[62]

Such a limitation is consistent with this Court's holding in *Stoneridge*, 552 U.S. at 166 (stating that the alleged conduct was not sufficiently related to the allegedly fraudulent disclosures even though it directly facilitated those disclosures). A clear

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[61] This clarification would result in a standard for foreign-cubed cases that appears to align with the test used in the D.C. Circuit, which holds that "jurisdiction is appropriate when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and 'directly cause' the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere". *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987).

[62] *Cf.* Brief for Petitioners 25 n. 11.

articulation of this limitation with respect to private actions under § 10(b) and Rule 10b-5 would eliminate the asserted differences among the Circuits and would minimize the risk of interference with the policy balances embodied in the securities laws and regulations of foreign nations.

C. Clear Rules Limiting the Extraterritorial Scope of § 10(b) and Rule 10b-5 Would Be Consistent with International Law and Would Promote Efficient Global Capital Markets

The sovereign right of each nation to prescribe laws and adjudicate claims regarding persons within its territory is foundational to international law.[63] Where more than one sovereign state claims jurisdiction, the states exercising jurisdiction should do so in a way that is compatible with the exercise of jurisdiction by other states. The primary bases for assertion of jurisdiction are: (i) substantial conduct within a state's territory; and (ii) conduct outside the state's territory that is intended to, or does have, a substantial effect[64] inside its territory.[65]

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[63] U.N. Charter art. 2, para. 1. The U.K. has set out in detail its position on the international law dimensions of extraterritorial application of U.S. law in previous briefs to this Court. *See, e.g.*, Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

[64] The effects doctrine is given its primary application in antitrust law. *See, e.g., Hartford Fire Ins. Co. v. California*, 509

The Second Circuit's conduct and effects test,[66] like the SEC's proposed test for its own enforcement jurisdiction,[67] seems to resemble these accepted international standards for the assertion of jurisdiction.[68] But, those standards include and are limited by the caveat that a state must not exercise jurisdiction where to do so would be "unreasonable", which circumstances include the likelihood of conflict with regulation by another state.[69] The United Kingdom submits that assertion of jurisdiction in private foreign-cubed securities cases is "unreasonable". As in *Empagran*,[70] case-by-case analysis is unnecessary to reach this conclusion, because the likelihood of conflict with regulation by

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U.S. 764, 795-796 (1993); *Gencor Ltd. v. Comm'n of the European Communities*, Case T-102/96, 1999 E.C.R. II-753 ¶ 90.

[65] *See* Restatement § 402(1).

[66] *See, e.g., Morrison*, 547 F.3d at 171; Brief for Petitioners 18-22.

[67] *See* Brief for the United States as *Amicus Curiae* on the Petition for a Writ of Certiorari 13-14.

[68] *See* Restatement § 402(1).

[69] The Restatement lists various factors relevant to determining whether exercise of jurisdiction is reasonable, including "(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory" and "(h) the likelihood of conflict with regulation by another state". Restatement §§ 403(2)(a), (h).

[70] 542 U.S. at 167-168.

another state[71] is so strong as to be of paramount concern in any case concerning foreign investors injured from misleading statements or omissions made outside of the United States by a foreign issuer of securities.

Elsewhere in this Brief we have outlined elements of the procedural framework that make the U.S. one of the most attractive jurisdictions in the world for plaintiffs seeking to commence securities fraud actions.[72] Allowing U.S. courts to hear foreign-cubed securities cases based on the analysis offered by Petitioners would effectively vest U.S. courts with universal jurisdiction[73] over securities violations—a step that would be at odds with international law, would encourage potential plaintiffs from all over the world to flood the U.S. justice system, and would have U.S. law "rule the world". *Microsoft*, 550 U.S. at 455.

Petitioners suggest that the application of the doctrine of *forum non conveniens* resolves these

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[71] *See* Restatement § 403(2)(h) (stating that "the likelihood of conflict with regulation by another state" is relevant to determining whether exercise of jurisdiction is reasonable); *see id.* cmt. g.

[72] *See supra* Part II.C.

[73] At international law, universal *criminal* jurisdiction is recognized in a limited range of cases of universal concern, such as piracy and certain heinous crimes. *See* Restatement § 404; Vaughan Lowe, *International Law* 177-184 (2007). However, in no category of *civil* cases is universal jurisdiction clearly recognized at international law, unless the states concerned have consented to it by treaty or it has crystallized in customary international law. *See generally* Restatement § 404.

comity concerns.[74] But, *forum non conveniens* fails to adequately address the concerns raised here. Within the U.S. judicial structure of multiple Circuit Courts of Appeal and nearly one hundred District Courts, an ad hoc, case-by-case approach generates too much unpredictability of outcome to provide the reasonable certainty that capital markets need and to protect a sovereign's right to decide what legal and regulatory regime should apply to actions and consequences within its territory.

The balancing test formulated by the Second Circuit inquires into what is "central or at the heart of a fraudulent scheme" and whether activities in the United States were "more than merely preparatory" and "directly caused losses to investors abroad". *Morrison*, 547 F.3d at 174, 171. Petitioners, citing the SEC and the Solicitor General, support the "material and substantial" test, which would also require a case-by-case analysis of whether there was "significant conduct within the United States that is material to the fraud's success". Brief for the United States as *Amicus Curiae* on the Petition for Writ of Certiorari 13; Brief for Petitioners 18-22, 40. Each of these formulations demands highly fact-sensitive, case-by-case assessments; each lends itself to the molding of facts to meet the language of the test. Different courts could reach different conclusions, without incurring reviewable legal error, on identical facts. The resulting unpredictability of outcomes will inevitably lead to more lawsuits and to more uncertainty in the marketplace.

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[74] Brief for Petitioners 41-42.

Efficient capital markets depend upon transparency. Transparency is served by standards that are readily understood by local and foreign issuers and investors, without the need for costly and time-consuming case-by-case legal advice. Moreover, the attractiveness of the United States as a destination for U.K. and other foreign investment depends upon a predictable legal environment.[75] Transparency and predictability would be enhanced by the adoption of either of the rules proposed herein.

V. RESTRAINING EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS WILL NOT LEAVE AN ENFORCEMENT VOID

In *IIT, International Investment Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975), Judge Friendly stated that "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners". No one can reasonably dispute that conclusion; however, that observation neither suggests nor supports the broad applications of U.S. securities law that have subsequently been sought through its invocation. It is not the case that adoption of a rule restraining extraterritorial application of Rule 10b-5 would cause or allow the

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[75] *See* Schumer-Bloomberg Report, *supra* note 53, at 73-78. This Court noted similar concerns in *Stoneridge*, 552 U.S. at 164.

United States to become a base for foreign frauds. It would not leave an enforcement void.

First, fraud continues to be actionable in the U.S. under state law.[76] For example, Florida law recognizes common law actions for fraud and deceit,[77] fraudulent misrepresentation[78] and negligent misrepresentation.[79] Thus, the alleged conduct by the U.S. subsidiary in this case may be actionable as common law fraud, even if it is not securities fraud.

Second, the SEC may choose to commence action "[w]henever it shall appear to [it] that any person has violated any provision of" the Exchange Act or Rule 10b-5. Exchange Act, § 21(d).[80] Critically, in cases involving foreign issuers, SEC enforcement action (unlike a private suit) permits the opportunity

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[76] The Delaware Court of Chancery, for example, has recently applied the premise that "a claim for common law fraud based on false statements in federal securities filings could be litigated independently in state court" to support its decision not to dismiss a common law fraud case based on alleged securities fraud. *NACCO Industries, Inc. v. Applica Inc.*, No. 2541-VCL 2009 WL 4981577, at *17, *20-22 (Del. Ch. 2009) (citing *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8 (Del. 2001)).

[77] *See, e.g., First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987).

[78] *See, e.g., Webb v. Kirkland*, 899 So. 2d 344 (Fla. Dist. Ct. App. 2d Dist. 2005).

[79] *See, e.g., Baggett v. Electricians Local 915 Credit Union*, 620 So. 2d 784, 786 (Fla. Dist. Ct. App. 2d Dist. 1993).

[80] 15 U.S.C. § 78u(d)(3)(A).

for cooperative dialogue with foreign regulators, such as the U.K. FSA.[81] Such dialogue and cooperation limit the risks of conflict with regulation by another state and of duplicative foreign litigation.

Finally, and perhaps most importantly, sovereign nations, such as the U.K. and Australia, should be allowed and expected to use their own well-developed legal and regulatory regimes to address alleged securities fraud. A failure to recognize that other valid enforcement regimes exist as an alternative to the expansion of the Rule 10b-5 private right of action threatens the legitimacy of the U.S. legal system, as well as that of the legal and regulatory regimes of other sovereign nations.

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[81] *See, e.g.*, MOU, *supra* note 49.

CONCLUSION

For the foregoing reasons, the United Kingdom respectfully submits that this Court should affirm the result reached below by the United States Court of Appeals for the Second Circuit. The United Kingdom also respectfully urges this Court to use this opportunity to set forth a clear rule restraining the extraterritorial application of the implied private right of action under § 10(b) of the Exchange Act and Rule 10b-5.

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AMICUS CURIAE BRIEF

No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, *ET AL.*,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., *ET AL.*
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, business

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief; and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief.

civil liberties, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and other related topics.

In particular, WLF has frequently appeared before this and numerous other federal and state courts to address issues concerning the proper scope of Section 10(b) of the Securities Exchange Act of 1934 and other related federal securities laws. *See, e.g., Merck & Co. v. Reynolds*, 129 S. Ct. 2432 (2009); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

STATEMENT OF THE CASE

This action arises out of the allegedly false and misleading statements made by Australia's largest bank, National Australia Bank, Ltd. ("NAB"), in disclosures filed with the Australian Securities and Investment Commission ("ASIC") pursuant to Australian laws and rules governing the Australian Stock Exchange. NAB's ordinary shares trade exclusively on Australian and other foreign securities exchanges and 99.97% of NAB's ordinary shares were held by investors from Australia and other places outside the United States. Nonetheless, Petitioners, the Australian named plaintiffs, purporting to represent a world-wide class of investors who have no connection to the United States, seek to have their claims adjudicated in the United States courts under United States law.

Petitioners argue that their claims are properly brought in the United States pursuant to Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) ("Exchange Act") and Rule 10b-5, 17 C.F.R. § 240.10b-5, because some of the conduct underlying NAB's allegedly false and misleading statements occurred at NAB's United States subsidiary, Homeside Lending, Inc. ("Homeside"). Pet. Br. at 6-7. According to Petitioners, Homeside, a mortgage service provider, intentionally overvalued its mortgage portfolio in order to achieve overinflated earnings targets and then transmitted its allegedly fraudulent financial information to NAB. NAB, in turn, incorporated this information into reports it filed with ASIC thus rendering the reports false and misleading.[2] *Id.* at 5-6. After NAB disclosed problems with Homeside's mortgage portfolio and ultimately wrote down the value of this portfolio, NAB's shares declined in value allegedly causing loss to Petitioners and other members of the class.

The district court dismissed Petitioners' complaint on the basis that it lacked subject-matter jurisdiction over their claims. Pet. App. 23a-45a. The district court concluded that all of the elements of Petitioners' claims took place outside the United States and the United States conduct "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 41a-42a. The court of appeals affirmed, holding

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[2] Because NAB has issued American Depository Receipts ("ADR"), it is required to file disclosures with the SEC. These disclosures are virtually identical to NAB's Australian disclosures, but the Australian plaintiffs do not allege that they were even aware of the SEC filings, much less relied on them.

that it was NAB's executives and advisors in Australia who bore "primary responsibility" for NAB's disclosures and, therefore, the actions in Australia were "significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of numbers in Florida." Pet. App. 1a-22a.

SUMMARY OF ARGUMENT

The issue presented in this case is whether the implied cause of action under Section 10(b) of the Exchange Act allows for the recovery of losses suffered by foreign investors trading foreign securities on foreign exchanges. For Petitioners to succeed, they must show not only that Section 10(b) applies in general to conduct that affects only securities traded on a foreign exchange, but also that courts should extend the implied cause of action under Section 10(b) to include losses suffered by foreign investors. Congress, however, enacted the Exchange Act to regulate and control United States securities exchanges and to protect United States investors. As this case involves neither, the court of appeals should be affirmed.

Whether Congress has exercised its authority to enforce its laws beyond the United States in any particular case is a matter of statutory construction. *EEOC v. Arabian American Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991). There is a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This rule reflects that Congress is deemed to respect the legitimate sovereign interests of other countries and

intends to avoid any potential conflict with laws of different nations where possible. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004).

The Exchange Act is virtually silent on its application outside the United States. *See Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995). Indeed, its occasional references to "foreign commerce" or "commerce ... between any foreign country and any state" are less clear and definitive than language this Court has previously held to be inadequate to confer extraterritorial effect. *See Aramco*, 499 U.S. at 251 ("we have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad.") (emphasis in original). The virtual silence in the Exchange Act regarding its foreign application is unsurprising; the purpose of the statute was the protection of United States investors and the regulation of United States exchanges, not the creation of worldwide antifraud rules. *See* Section I.B *infra*. This is revealed in the Exchange Act's statutory language and legislative history, neither of which reveals any concern for foreign investors trading on foreign exchanges. *Id.*

Congress did not consider the possibility of private suits under Section 10(b) when it passed the Exchange Act in 1934; they are a subsequent judicial creation. Congress did consider such suits, however, in 1995, when it passed the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995). There is no suggestion in the language of that statute or its legislative history that Congress intended the implied cause of action to extend to

foreign investors suing to recover losses incurred on foreign exchanges. See Section I.C, infra.

Principles of comity also argue against extending the implied cause of action to include losses suffered by foreign investors on foreign exchanges. Securities regulation touches directly on a nation's ability to regulate its own commercial affairs. Other countries have made their own determination on both the disclosure requirements of public companies and the remedies to be afforded to investors who suffer losses. The United States should not interfere with those determinations by affording foreign investors additional remedies in its own courts without a compelling justification. No such justification is present here.

The arguments against extending the implied cause of action to foreign investors suing to recover for foreign losses, as well as the patent practical concerns of managing a large class action where all the class members plus much of the evidence is located outside the United States, counsel against recognizing a cause of action even where the conduct within the United States forms a material part of the fraudulent scheme. Without a direct effect on a United States investor or exchange, the congressional concerns reflected in the Exchange Act are simply not implicated and the foreign investors should rely instead on the remedies that their own domestic law provides.

ARGUMENT

I. Allowing Foreign Investors to Recover Under the Exchange Act for Foreign Losses Violates the Presumption Against Extraterritorial Application of United States Statutes.

A. United States Laws Apply Only Within Its Territories Unless A Clear And Express Contrary Intent Appears In The Statute.

For over a century, this Court has applied the strong presumption that Acts of Congress do not ordinarily apply outside the United States and has declined to give extraterritorial effect to domestic laws absent contrary congressional intent. *See, e.g. Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993); *Aramco*, 499 U.S. 244, 248 (1991); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-59 (1909). This "presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States ... is based on the assumption that Congress is primarily concerned with domestic conditions" (internal citation omitted)); *see also Small v. United States*, 544 U.S. 385, 388 (2005) (applying "'notion that Congress generally legislates with

domestic concerns in mind'" to determine scope of statutory phrase (citing *Smith*, 507 U.S. at 197)).

In applying this presumption, the Court "look[s] to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond [the United States.]'" *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). This congressional purpose must be "clearly expressed," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), and "definitely disclose an intention to give [the statute] extraterritorial effect." *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925). "Boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas" is insufficient. *Aramco*, 499 U.S. at 251. So, in *Chisholm*, broad jurisdictional language that the Federal Employers Liability Act applied to common carriers engaging in "interstate or foreign commerce" or commerce between "any of the States or territories and any foreign nation or nations" was held to be insufficient to apply the Act to injuries to an employee suffered outside the United States. *Chisholm*, 268 U.S. at 31; *accord Aramco*, 499 U.S. at 249-51 (application of statute to commerce "between a State and any place outside thereof" insufficient to indicate extraterritorial effect).

B. The History and Purpose of the Exchange Act Evidence That Congress Had Domestic Concerns in Mind When It Enacted the Exchange Act And Did Not Intend To Extend Its Application Outside the United States.

There is no evidence in the language and history of the Exchange Act that Congress intended to extend the Act's coverage beyond the United States. Congress enacted the Exchange Act in the midst of the Great Depression to address the collapse of the United States economy and to restore United States investors' confidence in the United States' markets. *See* Katherine J. Fick, *Such Stuff as Laws are Made On: Interpreting the Exchange Act to Reach Transnational Fraud*, 2001 U. CHI. LEGAL. F. 441, 445 (2001); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 407-408 (1990); Gregory K. Matson, *Restricting the Jurisdiction of American Courts Over Transnational Securities Fraud*, 79 GEO. L. J. 141, 143 (1990). Public perception was that excessive speculation in the stock market had caused the unprecedented rise and subsequent crash in the United States stock market, which dragged the United States economy down with it.[3] *Id.* Congress's primary concern when it enacted the Exchange Act

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[3] Government investigations revealed that the manipulation of market securities prices, achieved through the mass purchase and sale of securities by exchange members to increase or decreases prices, also contributed to the stock market decline. Thel, *supra* at 413. This strategy "did not depend on communication at all, but rather on the brute force of concentrated economic resources." *Id.*

was to protect the United States markets and United States investors from a recurrence – a wholly domestic concern reflected in the Exchange Act's language and legislative history.[4]

The purpose of the Exchange Act was two-fold – to regulate and control the United States' securities exchanges and to protect United States investors. Section 2 of the Exchange Act, titled "Necessity for Regulation," plainly states its purpose to regulate and control the securities exchanges, which are affected by a "national public interest." 48 Stat. 881. Significantly, Section 2 makes repeated use of the word "national" to describe the "market system for securities" and the "system for the clearance and settlement of securities transactions" Congress sought to regulate as well as the "public interest" it sought to protect. *Id.* Moreover, the legislative history of the securities legislation reveals explicit

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[4] *See, e.g.*, Securities and Exchange Act of 1934, Title I, § 2, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a, et seq.) (listing "national emergencies" caused by "manipulation" of securities prices and "excessive speculation" as one the reasons necessitating regulation and control of the securities exchanges); H.R. REP. NO. 73-1383 (April 30, 1934) ("the bill ... attempts to change the practices of exchanges and the relationships between listed corporations and the investing public to fit modern conditions ... [because] the lesson of 1921-30 is that without changes they cannot endure."); 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *reprinted in* 78 Cong. Rec. 2264 (1934) (recommending that Congress enact legislation to regulate the exchanges to protect investors from speculation); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416, comment a (1987) (principal purpose of the securities legislation is "to protect United States investors as well as the securities markets of the United States and those who buy and sell in those markets").

Congressional intent to protect United States investors trading on the United States markets.[5]

By contrast, neither the language of the Exchange Act nor its legislative history evidences any congressional concern with foreign citizens trading foreign securities on foreign exchanges. Petitioners primarily rely on two phrases in the Exchange Act. First, Petitioners point to Congress's use of the vague term "foreign commerce" in the Exchange Act's preamble. Pet. Br. at 23. Second, they note the inclusion of commerce "between any foreign country and any State" in the Act's definition of the term "interstate commerce." *Id.* Petitioners also argue that the explicit extraterritorial limit contained in Section 30(b) of the Exchange Act demonstrates that Congress intended that the remainder of the Act should apply extraterritorially. *Id.* at 39-40.

These terms are very similar to the statutory language considered by this Court in *Aramco* and found to be insufficient to indicate a congressional intent to apply the statute outside the United States. In *Aramco*, the Court considered whether Title VII of the Civil Rights Act of 1964 applied to United States citizens employed by American employers outside the United States. Title VII stated that it applied to employers engaged in "commerce ... between a State and any place outside thereof" and also expressly

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[5] *See, e.g.*, S. REP. NO. 73-47 (1933) (commenting on the "billions of dollars" that the "American public" invested in "practically worthless securities, both foreign and domestic"); S. REP. NO. 73-1455 (1934) (commenting on the need to regulate investment bankers who "indulged in practice of doubtful propriety in the promotion of foreign loans and in the sale of foreign securities to the American public").

exempted employers "with respect to the employment of aliens outside any State." *See Aramco*, 499 U.S. at 249-53. This Court held that the quoted language was too ambiguous to indicate a congressional intent that Title VII should apply extraterritorially; it noted that when Congress does intend legislation to apply outside the United States, it knows how to make a clear statement to that effect. *Id.* at 258.

A review of the Exchange Act's legislative history reveals that the impetus behind the Act's references to foreign commerce was to provide protection to United States investors who trade in foreign securities in the United States, not to foreign investors trading foreign securities on foreign exchanges. Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 699-701 (1990) (reference to foreign commerce was inserted to address concern that "its absence would jeopardize statutory coverage of foreign securities trading in the United States."). The legislative history of the Exchange Act makes no mention whatsoever of lawsuits involving foreign exchanges. *Id.* at 706. In fact, the legislative history of the related Securities Act of 1933 reveals Congressional apathy towards securities transactions conducted on foreign exchanges. *Id.* at 695.

Section 30(b) also provides no support for the extraterritorial application of the Exchange Act. Although it states that the Exchange Act may apply to persons transacting business in securities outside the United States, that is so only if the Securities and Exchange Commission ("SEC") issues rules and regulations making the statute applicable to such

businesses where "necessary or appropriate ... to prevent the evasion" of the Exchange Act. *See* 15 U.S.C. § 78dd(b). "That rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987). At least one commentator has also noted that because Congress had failed to follow England's lead in exempting foreign government securities from the Securities Act and Exchange Act's requirements, it enacted Section 30(b) as an "olive branch" to signal to foreign governments that it would not interfere with those foreign securities activities that operated "without the jurisdiction of the United States" – i.e., did not affect domestic traders. Under this view, Section 30(b) further supports the presumption that Congress did not intend that the Act should apply extraterritorially. Sachs, *supra* at 698-699.

Thus, while courts have repeatedly noted the Exchange Act's silence on its extraterritorial application,[6] the presumption against such application could not be stronger. The historical context of the Exchange Act, its language and the legislative history all evidence congressional concern with United States markets and United States investors, and an intent to enact legislation that regulates and controls such markets and protects such investors. Congress expressed no analogous concern with foreign investors trading foreign securities on foreign exchanges.

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[6] *See, e.g., Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F. 3d 118, 125 (2d Cir. 1998); *Itoba Ltd.*, 54 F.3d at 121.

C. Absence of Express Congressional Intent to Apply the Exchange Act Extraterritorially Means the Court Should Not Recognize an Implied Cause of Action for Foreign Investors Trading Foreign Securities on Foreign Exchanges.

The presumption against extraterritorial application of United States statutes carries particular weight in this case because it concerns the judicially-created implied cause of action under Section 10(b) of the Exchange Act. The history of the provision shows that Congress did not "consider[] the possibility of private suits" under Section 10(b) when it passed the Exchange Act. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729 (1975). Neither did the SEC when it adopted Rule 10b-5. *Id.* at 730. Instead, private actions under Section 10(b) and Rule 10b-5 arose through judicial implication. *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (recognizing an implied private action under 17 C.F.R. § 240.10b-5). "Concerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

This Court limits the right to pursue implied actions by requiring plaintiffs to belong to the class of intended beneficiaries. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (implied action available only to plaintiffs who belong to "the class for whose especial benefit the statute was enacted"). This requirement applies equally to actions implied under the federal securities laws. *See Blue Chip Stamps*, 421 U.S. at 754.

In *Blue Chip Stamps*, the Court considered whether the implied cause of action under Section 10(b) of the Exchange Act extended to an investor who did not actually purchase or sell the relevant security. The Court held that it did not, even though the potential investor may have suffered losses due to a violation of Section 10(b) by the defendants. *Id.* at 738-55. Because both the terms and underlying purpose of the Exchange Act showed a congressional intent to limit civil remedies to actual purchasers or sellers of securities, the implied cause of action should be similarly limited. *Id.* at 735-36.[7]

Here, the express terms and the underlying purpose of the Exchange Act is to regulate the United States exchanges and to protect United States investors; the implied cause of action under Section 10(b) should be limited accordingly. This is confirmed by the legislative history of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) ("PSLRA"), the most detailed consideration by Congress of the implied cause of action under Section 10(b) and Rule 10b-5. In the PSLRA, Congress imposed limits on private actions under the securities laws, particularly class actions, to reduce meritless suits. In doing so, Congress determined that "the private securities

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[7] *See also Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), where the Court refused to imply a cause of action in favor of unsuccessful bidders for a company under Section 14(e) of the Securities Exchange Act, as added by Section 3 of the Williams Act, 82 Stat. 457 (as codified at 15 U.S.C. § 78n(e)), or under Rule 10b-6, 17 C.F.R. § 240.10b-6. The Court considered the Williams Act's legislative history and concluded that the intended beneficiaries of the Act are investors confronted with a tender offer, not offeror-bidders. *Id.* at 30-33.

litigation system is too important to the integrity of *American* capital markets to allow the system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. REP. NO. 104-369, at 26 (1995) (Conf. Rep) *reprinted in* 1995 U.S.C.C.A.N. 730, 731 (emphasis added). The Senate Report concluded that "*United States* securities markets are the most liquid and deep in the world" and that private rights of action together with the SEC enforcement program contribute to the "success of the *U.S.* securities markets." S. REP NO. 104-67, at 8 (1995) *reprinted in* 1995 U.S.C.C.A.N. 679, 687 (emphasis added). Nowhere in Congress's lengthy discussion of private causes of action under the securities laws, or in the text of the PSLRA itself, is there any mention of foreign investors or the benefits of allowing them to bring an action under Section 10(b) for losses suffered outside the United States.

In sum, the intended beneficiaries of the Exchange Act are United States investors and persons trading on the United States securities exchanges, not foreign citizens trading foreign securities on foreign exchanges. The legislative history of the Exchange Act and the PSLRA does not contemplate lawsuits by foreign citizens trading foreign securities on foreign exchanges. If anything, the legislative history demonstrates congressional apathy towards such investors. The Court's implied action jurisprudence therefore bars Petitioners' action.

D. Recognizing a Cause of Action For Foreign Investors Trading Foreign Securities On Foreign Exchanges Would Be Contrary To The National Public Interest.

When determining whether an implied right of action exists, a court must also ascertain whether it is "consistent with the underlying purposes of the legislative scheme." *See Piper*, 430 U.S. at 39; *Cort*, 422 U.S. at 78 (same). As the Court recognized in *Blue Chip Stamps*, private actions under Section 10(b) and Rule 10b-5 are "a judicial oak which has grown from little more than a legislative acorn." 421 U.S. at 737. In the absence of "conclusive guidance" from Congress or the SEC on the contours of the cause of action, it is proper to consider policy factors regarding the advantages and disadvantages of implying a cause of action for a particular class of plaintiffs. *Id.*

Recognizing an implied cause of action for foreign investors trading on foreign exchanges would invite virtually any aggrieved investor into the United States courts, further burdening already overtaxed district courts and diverting precious judicial resources to redress harms having nothing to do with United States markets or United States investors.[8] Undoubtedly, foreign investors will accept this invitation to avail themselves of more favorable United States law. *See* Paige Keenan Willison,

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[8] *See, e.g.*, RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (5th ed. 2003) ("By most if not all accounts, the federal district courts are severely overtaxed by their current caseloads.").

Europe and Overseas Commodity Traders v. Banque Paribas London: Zero Steps Forward and Two Steps Back, 33 VAND. J. TRANSNAT'L L. 469, 471 (2000) (explaining that "foreign victims of securities violations are tempted to seek recovery in the United States, rather than in their own countries"); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUMB. J. TRANSNAT'L L. 14, 61 (2007) ("Given that the substantive and procedural law of the United States currently provides certain advantages to plaintiffs as compared to the law of other systems, this might lead to the undesirable result of centralizing litigation in United States courts."). Indeed, the potential for a huge jury award is reason enough to select a United States forum over a foreign one. *See, e.g.* Richard T. Marooney & George S. Branch, *Corporate Liability Under the Alien Tort Claims Act: United States Court Jurisidiction Over Torts*, 12 CURRENTS INT'L TRADE L. J. 3 (2003) (noting that the recent explosion of litigation under the Alien Tort Claims Act involving claims that bear little or no connection with the United States may be attributed to the desire "to take advantage of accommodating procedural rules" and "the well-known propensity of U.S. juries to award huge damages awards, including punitive damages.").

Securities class actions already comprise approximately 47% of federal class actions and consume more judicial resources than other types of class actions. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1540-1541 (2006). Furthermore, international class

actions are particularly onerous on courts. They present challenges in managing discovery where a substantial part of the evidence and parties reside outside the United States and also for class notice and administration when most of the class members reside in other countries. The national public interest is hardly served by spending the nation's judicial resources on these particularly demanding actions and leaving United States taxpayers to foot the bill.

Recognizing a cause of action for foreign investors for foreign losses would also discourage foreign business investment in the United States. This Court has recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Overseas firms are justifiably wary of being involved in United States class actions due to the costs and disruption associated with such cases as well as the often high cost of settling them. *See Tellabs*, 551 U.S. at 313 ("Private securities actions, ... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.") Subjecting a company to a United States securities class action, even where it sells no securities in the United States, on the basis of conduct at a United States subsidiary or division would increase the risk of investing in the subsidiary or division in the first place. As the Court noted in *Stoneridge*, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here" if exposed to the risk of liability under Section 10(b) and the resulting uncertainty and disruptions of class

action lawsuits. 552 U.S. at 163-64. This reasoning supported *Stoneridge*'s prudential limit on the implied cause of action so that it did not extend to an issuer's vendors and customers, which may include overseas firms. Similarly, it supports a limitation on the implied cause of action where the claims would be aimed directly at overseas firms.

II. The Extraterritorial Application of the Exchange Act to Actions in Which a Foreign Jurisdiction Has Greater Interest Than the United States Offends Principles of International Comity.

The Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *see also Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* at 164. It "reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow" and "thereby helps the potentially conflicting laws of different nations work in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

Australia and other foreign nations have a strong interest in regulating their securities exchanges and designing their own private or public securities

enforcement schemes. United States law often conflicts with the regulations and enforcement schemes adopted by other nations. *See* Buxbaum, *supra* at 61-64; Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 957 (1994). For example, some nations are reluctant to even regulate securities transactions. *See* Matson, *supra* at 164. Other nations regulate securities transaction through public enforcement schemes and do not afford investors private rights of action under securities law. *See* Buxbaum, *supra* at 61. Moreover, American legal doctrines – such as the fraud on the market doctrine – are not necessarily recognized abroad. *Id.* Finally, certain procedural mechanisms, available in the United States, such as class actions and contingency fee agreements, are not available in other nations. *Id.* at 63. Thus, even if the concerns addressed by United States anti-fraud regulations are the same as those addressed by foreign anti-fraud regulations, "many differences remain both in the specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries." *Id.* at 61.

To avoid friction between United States and foreign law and policies, principles of international comity require United States courts to respect the regulatory and enforcement schemes other nations adopt and the policy judgments they embody. *See, e.g., Empagran*, 542 U.S. at 169 (when American regulatory "policies could not win their own way into the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them in an act of legal imperialism, through legislative fiat"); *Microsoft Corp.*, 550 U.S. at 454

("United States law governs domestically but does not rule the world."). Indeed, some foreign nations have enacted "blocking statutes" and "secrecy laws" to combat the extraterritorial application of United States law. *See* Matson, *supra* at 166-67. Respecting the laws of a foreign nation not only prevents such hostile reactions to and resentment towards the United States, but it also benefits the United States and the international community as a whole by promoting reciprocity in foreign tribunals. *See Chisholm*, 268 U.S. 29 ("interference with the authority of another sovereign, contrary to the comity of nations" may breed resentment); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American businesses and industry will hardly be encouraged if ... we insist on parochial concept that all disputes must be resolved under our laws and in our courts."). Moreover, respect for the laws of foreign nations is "essential to the growth of an international legal and financial community." Matson, *supra* at 166.

Here, application of United States securities law runs the real "risk of interference" with Australia's securities law and its "ability to independently regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. Australia has adopted a regulatory and enforcement scheme that governs the Australian Stock Exchange and Australian issuers thereby providing a forum for Petitioners to bring a class action lawsuit. The Australian lead plaintiffs (and other foreign investors) purchased Australian securities on an Australian or other foreign securities exchange in reliance upon alleged misstatements an Australian company made in Australia. Under a traditional conflicts of law analysis, Australia plainly

has the greatest interest in this action. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971).

The remedy sought by the plaintiff class also underlines the greater interest of Australia in this action. As the Court in *Empagran* recognized, even where nations may agree about the undesirability of primary conduct, such as price fixing or fraud, they may disagree dramatically about appropriate remedies. 542 U.S. at 167. In the PSLRA, Congress made its intent clear that private securities fraud actions focus on the recovery of loss actually suffered by the plaintiff. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (discussing 15 U.S.C. § 78u-4(b)(4)). The plaintiff class is seeking to recover losses suffered in Australia and any recovery by the class will be largely returned to Australia, less plaintiffs' counsel's fees and expenses.[9] By litigating in United States courts and invoking United States law, the Australian plaintiff class are avoiding any restrictions that Australian law may place on their ability to recover their losses "thereby upsetting a balance of competing considerations that their own domestic [securities] laws embody." *Empagran*, 542 U.S. at 167.

Therefore, none of the factors courts consider when determining what law to apply favor the application of United States law. Application of the Exchange Act here thus begs the same question the

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[9] This consideration is not present in the context of a government action which typically seeks broad relief rather than damages and generally is not required to demonstrate economic losses in addition to a violation of the relevant law. *Empagran*, 542 U.S. at 170-71.

court asked in *Empagran*: "Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" *Empagran*, 542 U.S. at 165 (emphasis omitted). The answer, again, is the same: "We can find no good answer to the question." *Id.*

Moreover, allowing Australian investors who purchased Australian securities on the Australian Stock Exchange to bypass Australia's securities law would encourage forum shopping. Petitioners have an adequate remedy in Australia. They are presumably pursuing their claims in the United States rather than Australia so that they may take advantage of what they perceive to be more favorable law. Certain American legal doctrines and procedural mechanisms may appear more attractive to Petitioners than those available to them in Australia. For example, Australia has not recognized the fraud on the market theory. *See* Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 MELB. U. L. REV. 621, 655 (2005). Similarly, while class actions are available in Australia, they are more difficult to finance because the losing party must bear the costs of litigation and contingency fee arrangements are generally prohibited. *See, e.g.*, S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289, 301 (2001); Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 COMMON L. WORLD REV. 123, 143 (2002). That these characteristics of the United States legal system –

absent in Australia – may indeed prove advantageous to Petitioners is no reason to allow them to proceed in United States courts.

This case belongs in Australia. The United States can assert no interest greater than Australia's interest in enforcing its own laws against its own citizens based on conduct occurring on its own territory. Moreover, no good can come from the exercise of jurisdiction over this action; it would only offend the principles of international comity and encourage securities plaintiffs from around the world to pursue actions in the already overtaxed United States district courts. All the foregoing further suggests that Congress did not intend extraterritorial application of the Act.

III. Foreign Investors Purchasing Securities Outside the United States Have No Implied Cause of Action Under Section 10(b) Even Where a Material Part of the Alleged Fraudulent Conduct Occurs in the United States.

When considering the proper contours of the implied cause of action under Section 10(b), it is proper to weigh the practical difficulties of applying an expansive cause of action and limit the availability of a remedy under the statute accordingly. *Blue Chip Stamps*, 421 U.S. at 748-49. This consideration counsels for a prudent limitation on the implied cause of action by not allowing it to be invoked by foreign investors seeking to recover foreign losses.

The presumption against extraterritorial effect and principles of international comity dictate that the

implied cause of action under Section 10(b) does not extend to foreign investors purchasing securities on foreign exchanges. Nonetheless, some courts have allowed some foreign investors to bring claims under Section 10(b) even for securities purchased outside the United State, where "the defendant's activities in the United States were more than 'merely preparatory' to a securities fraud conducted elsewhere," and "these activities or culpable failures to act within the United States 'directly caused' the claimed losses." *Itoba Ltd.*, 54 F.3d at 122 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975) and *Alfdadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991)). Other courts will allow foreign investors to sue for foreign losses "where the defendants' conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment." *Continental Grains (Aust.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979).

This Court should reject these unworkable tests that allow foreign investors to proceed with claims based solely on whether some portion of the alleged fraudulent conduct occurred in the United States. "The chronic difficulty with such a methodology has been describing, in sufficiently precise terms, the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998). The fact-specific inquiry required by this approach, as well as the ambiguity inherent in the stated tests has led inevitably to inconsistent application and a lack of clear guidance on this fundamental issue. "[A]ny notion that a single precedent or cohesive doctrine

may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005).

In response, Petitioners argue that this Court could resolve these issues by adopting a test that would allow a foreign investor to bring a claim under Section 10(b) for losses incurred overseas "where the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme." Pet. Br. at 19.[10] Petitioners state that this standard "would provide greater guidance to the lower courts in resolving future cases" but at the same time "permit the courts to make flexible case-by-case determinations of the extraterritorial applicability of the antifraud provisions of the Exchange Act." *Id.* at 32 and 40. Petitioners do not explain, however, *how* their proposed standard provides any greater clarity than the standards it would replace. It appears to simply replace one generally applicable standard with another that is no more precise. To determine

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[10] Petitioners base this proposed test on a test suggested by the SEC and Solicitor General. *Id.* The test suggested by the SEC and Solicitor General, however, applies in the context of enforcement or criminal actions by the SEC and/or United States. United States Amicus Br. at 13. The Solicitor General and SEC expressly state that their proposed test does not support allowing foreign investors to proceed under Section 10(b) to recover foreign losses unless they resulted "directly from the component of the scheme that occurred in the United States." Id. at 14. Petitioners omit this aspect from their formulation of the proposed test.

whether a defendant's conduct is "material" and a "significant component" of a fraudulent scheme, courts will have to engage in precisely the same fact-specific "flexible case-by-case determination" with the same lack of direction as they do when determining whether the conduct was "merely preparatory" and a "direct cause" of plaintiff's losses under the current standard. One can expect the same results: inconsistent and incoherent decisions as courts struggle to apply a general standard to varying factual allegations.

The fundamental problem with this approach is not the wording of the standard but rather the entire approach. Any attempt to describe the sort of conduct that should be sufficient to support a claim under Section 10(b) of the Exchange Act will, inevitably, be broadly stated and highly fact-dependent. As Judge Bork noted in *Zoelsch*, such tests tend to be "counterproductive" because "as we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable." 824 F.2d at 32 n.2. This leads necessarily to increased uncertainty and litigation over this threshold issue, further burdening American courts. *Id.* These practical difficulties, properly considered by the Court in considering the scope of the implied cause of action under Section 10(b), support a prudential limit on the implied cause of action by not allowing it to be invoked by foreign investors seeking to recover foreign losses.

Apart from the practical difficulties of applying the Petitioners' standard, there is no convincing basis in either law or policy to support extending the

implied cause of action under Section 10(b) to foreign investors for losses incurred for transactions executed on foreign exchanges. As discussed *supra*, there is no indication in the text or legislative history of the Exchange Act or the PSLRA that Congress intended for foreign investors to be able to bring such a claim. Courts that have extended the implied cause of action to foreign investors in some circumstances claim to be implementing "what Congress would have wished if these problems had occurred to it." *Bersch*, 519 F.2d at 993. But it is clear "that Congress in 1934 had no intention at all on the subject because it was concerned with United States investors and markets." *Zoelsch*, 824 F.2d at 33. A review of the PSLRA's legislative history shows a similar lack of intent in 1995 when Congress considered the proper scope of the implied cause of action under Section 10(b). Under these circumstances, any attempt to divine Congress's intentions with regard to foreign investors is destined to be fruitless. In any event, the absence of reliable evidence pointing one way or the other requires application of the presumption against extraterritoriality.

Other courts have candidly admitted that their decision to extend the implied cause of action to foreign investors "is largely based upon policy considerations." *Continental Grain*, 592 F.2d at 416. Two policy objectives have been identified as justifying suits by foreign investors in United States courts for foreign losses: (1) the prevention of the United States being used as a base for fraudulent activity directed at foreign investors thus diminishing confidence foreign investors have in American capital markets; and (2) the encouragement of other nations to take steps to

prevent fraudulent activity directed at the United States, which would be diminished if the United States was seen as condoning fraudulent conduct occurring within its territory. *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *see also Continental Grain*, 592 F.2d at 421-22.[11]

Neither objective is compelling and both are certainly outweighed by the strong arguments against extending the implied cause of action including principles of comity and the other policy considerations discussed *supra*. There is no reason why foreign investors would necessarily associate a fraud committed by a foreign issuer with the United States and its securities laws simply because even a material part of the fraudulent conduct occurred within the United States. One would more reasonably expect investors to connect the fraud with the regulatory regime where the issuer was headquartered or where the securities were sold. As this Court noted in *Stoneridge*, communication of the deceptive acts to the public is central to a claim under Section 10(b) and this communication must be connected to the purchase or sale of the relevant security. 552 U.S. at 160-61. Communication occurs where the public issuer is located or where the securities are sold, not where some part of fraudulent conduct takes place, even if that conduct is significant or material.

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[11] A third reason for recognizing the extraterritorial coverage of the Exchange Act's antifraud provisions is that it will assist the SEC in its enforcement role. *See Kasser*, 548 F.2d at 116. That is irrelevant here as this case concerns a private plaintiff seeking to recover damages on behalf of a class of foreign investors, not the SEC enforcing the federal securities laws and its regulations. *See Empagran*, 542 U.S. at 170-71.

In addition, failure to extend an implied cause of action to foreign investors for foreign losses does not mean that the United States condones fraudulent conduct when it is aimed at foreign investors or that it will become a "'Barbary Coast' ... harboring international securities 'pirates.'" *Kasser*, 548 F.2d at 116. The SEC has jurisdiction to bring enforcement actions over any significant fraudulent conduct occurring at a United States subsidiary of a foreign issuer.[12] Criminal penalties may also be available under the Exchange Act, 15 U.S.C. § 78ff, as well as other federal criminal statutes. *See, e. g.*, *Pasquantino v. United States*, 544 U.S. 349 (2005) (applying wire fraud statute to cover schemes to defraud foreigners through misrepresentations). Both the SEC's enforcement power and the threat of criminal penalties act as strong deterrents against fraudulent conduct. *Stoneridge*, 552 U.S. at 166. They are certainly sufficient to ensure that the United States does not become a "Barbary Coast" of international securities piracy. If Congress disagrees, then it may expressly provide a cause of action for foreign investors in United States courts to recover losses incurred overseas. In that legislation, Congress could balance the competing concerns of comity and foreign policy that such claims present. *See Zoelsch*, 824 F.2d at 33.

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[12] The SEC may have jurisdiction under Section 10(b) as it is not required to make any showing of reliance or damages, 15 U.S.C. § 78u(d)(1), and it may also have jurisdiction under Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), giving the SEC authority to bring enforcement actions against any person who provides substantial assistance to another person's violation of the securities laws.

The current standards applied by some lower federal courts in deciding whether to accept claims under Section 10(b) from foreign investors are unsatisfactory. They are difficult and time-consuming to apply, uncertain and inconsistent in outcome. There is a need for a clear and consistent rule, but it is not the rule proposed by Petitioners. Instead, the absence of any express authorization for extraterritorial effect, the stated domestic intent and purpose of the Exchange Act, and issues of international comity all strongly suggest that Congress did not authorize United States courts to accept any claims from foreign investors based on purchases or sales of securities on foreign exchanges no matter what fraudulent conduct occurred in the United States. The Court, therefore, should resolve the inconsistency and uncertainty in this area by setting this clear and prudent limit on the judicially-created cause of action under Section 10(b).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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